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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

LODI TRUCK SERVICE, INC.,
Appellant,

VS.

DIVISION OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA

On Appeal from the Superior Court of the State of California, County of San Joaquin, Appellate Department

JURISDICTIONAL STATEMENT

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55 pp

QUESTION PRESENTED

Whether the statutes of the State of California are repugnant to the Constitution and laws of the United States which the state court, by its decision appealed herein, decided in favor of their validity.

The State of California, through its Division of Labor Standards Enforcement, Department of Industrial Relations, seeks to apply the Industrial Welfare Commission's General Order 9-80[1], issued pursuant to Section 1177 of the California Labor Code, to control the work hours of mechanics, who are safety of operations employees of Lodi Truck Service, Inc., an interstate motor common carrier operating under a certificate issued to it by the Interstate Commerce Commission, whose work hours are under the plenary jurisdiction of the Secretary of the United States, Department of Transportation, pursuant to the Constitution and laws of the United States. The decision appealed herein determined that the state's assumption of control is valid and is not repugnant to the federal Constitution and laws.

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[1] Title 8, Section 11090 of the Administrative Code of the State of California. (App. B, infra, pp. 21-23)

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LODI TRUCK SERVICE, INC.

On Appeal from the Superior Court of the State of California, County of San Joaquin, Appellate Department

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Superior Court of the State of California, County of San Joaquin, Appellate Division, sought to be reviewed is unreported. (App. A, infra, pp. 1-5) An order of the said Superior Court denying a rehearing (App. A, infra, p. 6); a certification of the Superior Court to the Court of Appeal (App. A, infra, p. 7-8); a denial of the transfer on certification by the Court of Appeal of the State of California in and for the Third Appellate District (App. A, infra, p. 9); and the original Statement of Decision (App. A, infra, pp. 10-13) and Judgment (App. A, infra, pp. 14-15) of the Municipal Court of California, County of San Joaquin, Lodi Judicial District, are set forth in the Appendix A hereof.

JURISDICTION

The opinion of the Superior Court of California, County of San Joaquin, Appellate Division (App. A, infra, pp. 1-5) determining the validity of the involved statutes of the State of California, challenged as being repugnant to the Constitution and laws of the United States, was entered on February 6, 1986. A petition for rehearing was filed February 20, 1986 which was denied by the Superior Court on February 25, 1986. An application was filed for certification and transfer to the Court of Appeal, State of California, on March 6, 1986. On March 11, 1986, the Superior Court certified the transfer "to secure uniformity and to settle important questions of law" (App. A, infra, pp. 7-8), but the transfer on certification was denied by the Court of Appeal on March 27, 1986. (App. A, infra, p. 9) A Notice of Appeal to this Court was filed June 9, 1986. (App. A, infra, pp. 16-18)

The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (2). *Local 333B, United Marine Division of Intern. Longshoremen's Ass'n. v. Battle*, D.C. Va., 101 F.Supp. 650, affirmed, 342 U.S. 880, 72 S.Ct. 178, 96 L.Ed. 661 (1951); *Standard Oil Co. v. Johnson*, Cal., 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611. (1942)

Refusal to grant the transfer of the case on certification from the California Superior Court to the Court of Appeal leaves the aggrieved party without further remedy and the decision of the Superior Court became a final judgment rendered by the highest court of the State of California in which a decision could be had. California Code of Civil Procedure, §§ 904.1 and 911; *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941); *Golden v. Stansbury*, 155 Cal.App. 2d 480, 318 P.2d 164 (1954); *McMurtry v. Lucero*, 122 Cal.App. 2d 636, 265 P.2d 164 (1954).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The Constitutional provisions, statutes and regulations or the parts thereof, pertinent to the case are included in Appendix B hereof and are the following:

United States Constitution, Article I, Section 8, Clause 3; Article VI, Clause 2; Amendment XIV, Section 1 (App. B, infra, p. 19)

Fair Labor Standards Act, Sections 213 and 218 (29 U.S.C. §§ 213 and 218) (App. B, infra, pp. 19-20)

Department of Transportation Act, Section 3102 (49 U.S.C. § 3102) (App. B, infra, pp. 20-21)

Labor Code of the State of California, Sections 1178 and 1178.5 (App. B, infra, pp. 21-22)

Administrative Code of the State of California, Title 8, Section 11090 (App. B, infra, pp. 22-23)

STATEMENT

This case involves the question of whether the State of California may assume jurisdiction over the work hours of safety of operation employees of an interstate motor common carrier and if such assumption of control is repugnant to the federal Constitution and statutes. Congress, by the enactment of the Fair Labor Standards Act ("FLSA"), exempted the work hours of mechanics, safety of operation employees of interstate motor carriers, which were under the exclusive control of the Interstate Commerce Commission ("I.C.C."), and now the Department of Transportation ("D.O.T.") from the overtime provisions of that act. (29 U.S.C. 213 (b)(1); 49 U.S.C. 3102) The exemption is predicated upon Congress' intent to grant control of the hours of service of these employees to a single governmental agency. The FLSA contains a "savings" clause which permits a state to establish a lower maximum work week than is established by that statute **for employees whose work week is established under the FLSA** (29 U.S.C. 218) In *United States v. American Trucking Association, et al.*, 310 U.S. 534, 60 S.Ct. 1059 (1940), the United States Supreme Court concluded that "there were certain employees excepted, however, from these regulations (Section 218 of the FLSA) by Section 13(b)". Section 13(b)(1) (29 U.S.C. 213(b)(1)) exempts safety of operation employees of interstate motor carriers from the work week established by the

FLSA as well as from the overtime laws or regulations of any state and municipal government and their regulatory agencies. The judgment of the state court sought to be reviewed is in direct conflict with the decision of this court in the case cited, the language of the pertinent federal laws and the intent of Congress.

The instant case arose on July 22, 1983, when appellee, state Division of Labor, filed a suit in the Municipal Court, Lodi Judicial District, State of California, to collect overtime wages alleged to be due and owing to certain mechanic employees by appellant, an interstate motor carrier, pursuant to the Labor and Administrative codes of the State of California (App. B, infra, pp. 21-23) Pursuant to a stipulation between the parties, the Municipal Court action was tried based upon the pleadings and agreed Statement of Agreed Facts. Included as Appendix C hereof is the "Stipulation of the Agreed Facts". The stipulation describes appellant Lodi Truck Service, Inc. as a motor common carrier, operating in interstate and foreign commerce, between points in the State of California, Arizona, Nevada and Utah, under a certificate of public convenience and necessity issued to it by the I.C.C. and acknowledges the employment of the claimants as mechanics. Also described therein are the duties, responsibilities and qualifications prescribed the D.O.T. for mechanics employed by appellant.

The Municipal Court granted a judgment in favor of appellee and addressed as the **primary issue** the state regulation of the work hours of the mechanic employees of appellant which the court found valid and not repugnant to federal laws. (App. A, infra, pp. 10-13) It was concluded by the court, without stating the basis therefor, that there was no clear and manifest intent to preempt state law and, as the D.O.T. had not exercised its authority to regulate the work hours of mechanics, no conflict exists and the state can regulate the maximum hours of these employees. However, the court failed to consider the intent of Congress as expressed in the FLSA, Congressional debates, and decision of this court to grant exclusive jurisdiction over the work hours of mechanics and other safety of operation employees to a single governmental agency to the exclusion of any other federal, state or municipal body. A secondary issue was argued by the

appellee that appellant was precluded by res judicata from asserting a defense to the claims which was rejected by the court and that issue was not appealed.

With the failure of the appellee to challenge the court's opinion relative to the state issue of res judicata, the sole remaining question before the state courts was the single federal issue requiring determination of Congressional intent and interpretation of federal laws.

The appellant, Lodi Truck Service, Inc., appealed the judgment of the Municipal Court to the Superior Court of the State of California, County of San Joaquin, Appellate Division, which affirmed the decision of the lower court. (App. A, infra, pp. 1-5) Section 218 of the FLSA, the savings clause, was considered by the Superior Court which held that its enactment manifested Congress' clear intent **not** to preempt state law as to the hours and wages of employees engaged in intrastate and interstate commerce. It rejected the application of the motor carrier safety of operation employee exemption deciding that it does not apply to regulation by a state agency; rather, it concluded simply "that, as between two acts of the U.S. Congress, there was no concurrent jurisdiction over safety-of-operation employees by reason of the express language used in Section 13(b) of the FLSA (29 U.S.C. 213(b)." The Superior Court, as demonstrated by its order, did not consider the intent of Congress to except the 13(b)(1) (29 U.S.C. 213(b)(1)) employees from the overtime regulations of the federal, state and municipal work hour laws and regulations as determined by this court in *United States v. American Trucking Association*, supra, 60 S.Ct. at 1062, and reflected in the legislative history of the FLSA and Motor Carrier Act of 1935.

Appellant petitioned for an order vacating the judgment of the Superior Court and a rehearing which was denied. (App. A, infra, p. 6) Lodi Truck Service, Inc. then filed an application for certification and transfer of the case to the Court of Appeal of the State of California. Pursuant to the application, the Superior Court did certify the case for transfer to the Court of Appeal "to secure uniformity of decision and settle important questions of law." The court declared that its opinion "appears to constitute a decision of first impression insofar as safety-in-operation employ-

ees of motor carriers engaged in both interstate and intrastate is concerned". It further noted that the appellant contends that the court's opinion "runs counter to the decision of the U.S. Supreme Court in *United States v. American Trucking Association* (1940) 310 U.S. 543, 60 S.Ct. 1059, as well as the provisions of the Fair Labor Standards Act and the Motor Carriers Safety Act," and "it is felt that such an important decision of first impression should be reviewed and finally ruled upon by a higher court than this." (App. A, infra, pp. 7-8) On March 27, 1986, the transfer and certification was denied by the Court of Appeal. (App. A, infra, p. 9) Notice of Appeal to the Supreme Court of the United States was filed with the Superior Court of the State of California, County of San Joaquin on June 9, 1986. (App. A, infra, pp. 16-18)

THE QUESTION IS SUBSTANTIAL

1. Determination of the federal issue herein will be a decision of first impression as neither the United States Supreme Court nor any appellate court has previously resolved the involved question. California, other states and local governments and their regulatory agencies, for the past 48 years, have recognized and deferred to the plenary jurisdiction granted by Congress in 1935 and 1937 to the single federal agency over the work hours of motor carrier safety employees pursuant to the comprehensive legislative scheme embodied in the Motor Carrier Act of 1935 ("MCA") and the FLSA. The gradual dimunition of this deference and the assumption of the jurisdiction over the work hours of motor carriers' safety of operation employees by the state of California commenced with an amendment of its Labor Code in 1973 to establish maximum work hours for male employees. (California Labor Code, Section 1171) Prior to the amendment, maximum work hours were only prescribed for women and minors. In 1980, the state's Industrial Welfare Commission adopted General Order 9-80 (App. B, infra, pp. 22-23) which provides maximum work hours for persons employed in the transportation industry. Based upon this General Order, the state's Division of Labor in 1982 began taking jurisdiction over the work hours of safety employees of certain interstate motor

carriers, and after an investigation of the work hours of mechanics employed by Lodi Truck Service, Inc., the suit was filed which resulted in the judgment appealed herein. The investigation and suit against the appellant herein was followed by numerous similar actions brought by the state, claimants or employers in federal and state courts. Certain of the known pending court proceedings in which the primary issue is identical to the one involved herein are the following:

> **Before the Circuit Court of Appeals for the Ninth Circuit:** *Ram Trucking, Inc. v. Margaret Miller, et al.*, No. 84-2346; *Lodi Truck Service, Inc. v. Margaret Miller, et al.*, No. 84-2347; *Lemore Transportation, Inc. dba Royal Trucking Co. v. Margaret Miller, et al.*, No. 84-2348.[2]
>
> **Before the United States District Court, Northern District of California:** *Westside Transport, Inc. v. Margaret Miller, et al.*, No. C-84-6866; *O'Connell dba Shamrock Truck Lines v. Margaret Miller, et al.*, No. C-84-7090; *Beneto, Inc. v. Karla Yates, et al.*, No. C-86-0022.

There are also pending three suits before the Superior Court of the State of California and four suits in the Municipal Courts of the State of California involving the same question. The State Division of Labor is presently conducting numerous investigations of the overtime hours of motor carriers safety of operation employees and, undoubtedly, many will evolve into court suits seeking an answer to the federal issue involved herein.

The suits and investigations referred to above seek overtime pay for mechanic-employees of interstate motor carriers. However, the assumption of jurisdiction by the state is apparently not limited to mechanics for in a pending suit, it seeks to control the work hours of drivers and loaders of an interstate motor carrier.

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[2] Appeals from an order of the United States District Court for the Northern District of California of July 27, 1984 dismissing the complaints based upon abstention due to pending suits before two state courts and an investigation-audit being conducted by the California Labor Commission of the records of Lemore Transportation, Inc. dba Royal Trucking Co.

The Municipal Court of the State of California, County of Santa Clara, No. DC 85 115033 found that the state was preempted from assuming jurisdiction over the work hours of these motor carrier safety of operation employees. That opinion has been appealed by the state Division of Labor to the Appellate Division of the Superior Court of the State of California, County of Santa Clara, in No. CV 1067.

2. Resolution to this federal question is manifestly very important to the motor carriers with respect to their possible liability for past overtime wages, but of equal or even greater significance will be the effect of an adverse ruling on their future operations and practices. As described above, the State of California's Division of Labor only recently began assuming jurisdiction over the work hours of the motor carrier safety of operation employees. After the abstinence of 48 years, there are presently a limited number of carriers subject to the pending work hours investigations and suits. However, these carriers are less than the tip of an iceberg for the census maintained by the D.O.T. indicates that as of June 1, 1986, there were 12,884 regulated, unregulated and private motor carriers operating in interstate commerce and domiciled in the State of California that are subject to the D.O.T. safety jurisdiction, including its power of control over the work hours of mechanics and other safety employees. This number should probably be expanded by more than 300% to include the major and other carriers which have their principal places of business outside California that operate to, from and within and maintain terminals and facilities in that state. The ruling on the issue considered herein will affect all of these carriers and it is vital that the considered case be decided by this court.

3. Disposition of the issue involved herein will have an effect on highway safety of not only the over 26 million residents of California but people in all states. If it is determined that the State of California can assume jurisdiction over the work hours of the safety of operation employees of interstate motor carriers, such expansion of control unquestionably will be adopted by other state and local governments. Highway safety is directly affected by the economics or financial condition of the motor carrier employers and the employment of mechanics to service and

maintain motor vehicles in safe and operable conditions and make emergency highway repairs when and as needed is to a large degree controlled by cost—the cost of the mechanic. Maximum work hour laws and regulations are promulgated for one primary and paramount purpose: to discourage overtime work. In *Rivera v. Div. of Ind. Welfare*, 71 Cal.Rptr. 739, 265 Cal.App. 2d 576, 579 (1968), the court advised that: "The imposition of the premium rate for overtime work discourages overtime employment by making it more expensive for the employer." Time and one-half and double-time premium pay, as prescribed by the California regulations (App. B, infra, pp. 4-5) militates against the employment of mechanics for overtime work. There has been widely and regularly reported in the nation's newspapers, the marked increase in truck-related accidents and the decline of the financial condition of motor carriers since the partial deregulation of motor carriers which has exacerbated the highway safety problem. The danger to the public when motor vehicle equipment is unsafe or inadequately maintained can be readily appreciated when considering that gross weight of a fully loaded typical tractor and trailer, which travels at high speeds over the nation's highways, weighs between 75,000 and 80,000 pounds. (California Vehicle Code, Section 35551; 23 C.F.R. #658.13)[3]

Congress expressed its concern over highway safety and the effect of establishing maximum work hours for motor carrier safety employees when considering the Motor Carrier Act of 1935. Both the Senate and the House of Representatives rejected the proposal to establish specific work hours for these employees and left this jurisdiction up to the discretion of the I.C.C. The chairman of the House Committee on Interstate and Foreign Commerce advised the House of Representatives, during the debate on the MCA, that "It would be a serious mistake to write into this bill a definite maximum-hour provision that does not

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[3] A 1985 report of the motor carrier accidents statistics, issued by the D.O.T., states that the 1984 reported truck accidents increased by 18% over the same period in 1983 and by an additional 4% in 1985. The total number of truck accidents reported in 1985 exceeded 38,600 which is 22% above the 31,628 accidents reported in 1983, *Transport Topics*, April 21, 1986.

take into consideration all of the peculiarities and emergencies that exist in the motor-carrier industry." (79 Cong.Rec. 5652 and 12205) During the debates concerning the FLSA and the grant to the I.C.C. of control over the work hours of motor carrier safety employees under Section 13(b) exemption (29 U.S.C. § 213(b)), Congress judged "safety the important consideration". (81 Cong.Rec. 7875)

The United States Supreme Court in the leading case of *Levinson v. Spector Motor Carrier Service*, 330 U.S. 649, 67 S.Ct. 931, 938 (1947) reviewed the history and development of the Congressional safety program for interstate commerce, the power granted the I.C.C. to regulate the hours of service of motor carrier safety employees, and their exclusion from the overtime provisions of the FLSA and stated:

> "The logic of the situation is that Congress, as a primary consideration, has preserved intact the safety program which it and the Interstate Commerce Commission have been developing for motor carriers since 1936. To do this, Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the old limits set in Section 7 of the Fair Labor Standards Act. **Such overlapping, however, has not been authorized by Congress and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act.** (Emphasis added.)

Congress expressed its clear and manifest intent that safety and not overtime wages was its paramount concern in enacting the statutory provisions pertaining to the control of work hours of

these employees. Highway safety is the important aspect of the question raised in this case and a substantial portion of the public will be affected by its disposition.

4. Although 48 years have elapsed since the power has been given to the I.C.C. and the D.O.T. to regulate the work hours of the interstate motor carrier employees, there has been an obvious absence and paucity of judicial precedent related to the issue to be decided. During this period, if Congress wanted to share the jurisdiction over the work hours of these employees with other federal, state or local agency, it could have done so, but despite the numerous amendments to the Interstate Commerce, Fair Labor Standards and Department of Transportation Acts the power to regulate the hours remains unchanged. If a change or overruling is warranted or desired, it should come from Congress and not the courts.

All states have their wage and hour laws regulating their ~~interstate~~ INTRASTATE commerce, many of which have preexisted the FLSA but they have abstained from assuming jurisdiction over the overtime hours of safety of operation employees of interstate motor carriers. Some states specifically recognize the D.O.T. jurisdiction by writing exceptions into their wage and hour laws and regulations. Examples are the Minnesota Wage and Hour Law, Section 177.23, which provides that an employee does not include "... (16) any individual in a position for which the Department of Transportation has power to establish qualifications and maximum hours of service under 49 U.S.C. 304." The same exception is found in Montana Code Anno., Section 39-3-406(2)(a). Nevada excepts "drivers, drivers' helpers, loaders and mechanics of motor carriers subject to the Motor Carrier Act of 1935, as amended. (NRS § 608.018(1)(G)). Section 1350.5 of the Labor Code of **California**, until its repeal in 1973, excepted from the overtime hours "employees whose employers are exempt in Section 13 of the Fair Labor Standards Act as amended through February 1, 1967, from the provisions of Section 7 of the Fair Labor Standards Act." Ohio Minimum Wage Standards, Section 4111.3, adopts the "exemptions of Section 7 and Section 13 of the Fair Labor Standards Act of 1938, as amended" Rhode Island excepts from overtime pay any employee, including drivers,

drivers' helpers, mechanics and loaders of any motor carrier, including private carrier, with respect to whom the U.S. Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carriers Act of 1935. (Section 28-12-4.1 of the Rhode Island Labor Code). Title 21, Section 384(b) of the Vermont labor law relative to overtime shall not apply to: (5) those employees of a business engaged in the transportation of persons or property to whom the overtime provisions of the Fair Labor Standards Act do not apply, but shall apply to all other employees of such businesses.

In *People of the State of New York v. Dawson*, 139 NYS 2d 496 (1955), the court held that the state labor law did not apply to the hours of service of trucking employees whose hours were under the control of the I.C.C. The Connecticut court in *Davenport Taxi, Inc. v. Labor Commissioner*, 319 A.2d 386, 164 Conn. 233 (1973), found that Congress in enacting the FLSA completely precluded the state from regulating hours and overtime pay of employees of an interstate motor carrier. The Attorney General of the State of Connecticut issued an opinion that the regulated safety employees of interstate carriers are exempt from state overtime laws. 28 Conn. Atty. Gen. Rpt. 14 (1953). Administrative rulings were issued by the States of New Jersey and Maine that the state wage statutes could not cover personnel subject to regulations by a federal agency. *District of Columbia v. Schwerman Trucking Company*, 327 A.2d 818, 824 (1975) There was a contrary opinion by the Attorney General of the State of Maryland that was overruled by the legislature of that state. Id. at 824.

Therefore, the states, except for the posture taken by the California Division of Labor, recognize and defer to the exclusive power granted by Congress to the I.C.C., and now the D.O.T., to control the hours of service of motor carrier safety employees as part of the comprehensive program developed for highway safety. Because of the widespread consequences that can result from a decision which is inconsistent with the long established policies of the state legislatures, as reflected in their wage and hour statutes, it is important that this case be decided by this court.

5. The principal issue to be determined is whether Congress either explicitly or implicitly expressed or demonstrated its intent to vest the I.C.C., and now the D.O.T., with exclusive power over the work hours of safety of operation employees of interstate motor carriers. The decision of the California Superior Court (App. A, infra, pp. 1-5) for which the appeal is sought, rests upon the incongruous and illogical assumption that it was the intent of Congress to preclude the imposition of the federal FLSA overtime law to the work hours of the excepted motor carrier safety employees but allow the overtime statutes and/or regulations of any other federal, state, municipal or local government or agency to control these same work hours. Such a determination is manifestly inconsistent with the obvious intent of Congress and is less than reasonable.

Research indicates that the lead and apparently, the only case of this court which considered both the FLSA Section 18 "savings" and the Section 13(b)(1) motor carrier safety employee exemption clauses (29 U.S.C. §§ 213(b)(1) and 218) was *United States v. American Trucking Association, et al.*, supra. In that proceeding, the United States Supreme Court was required to determine the intent of Congress in enacting the MCA and FLSA, of any inconsistency in their application, and their relationship to the then existing wage and hour laws of the individual states. At the time of the passage of the MCA in 1935, "40 states had regulatory measures relating to hours of (motor carrier) employees". *United States v. American Trucking Association, et al.* 60 S.Ct. at 1065. The court determined, based upon the legislative history, that Section 13(b)(1) employees over whom the I.C.C and D.O.T. have the **power** to regulate the work hours were exempt from such regulation by any federal, state, or municipal law or agency and that the Section 18 "savings" clause was inapplicable to the work hours of those employees. The court held:

> "Section 7 of this Act (FLSA) limits the work week at the normal rate of pay of all employees subject to its terms and Section 18 makes the maximum hours of the Fair Labor Standards Act subject to further reduction by applicable or state law or municipal ordinances. There were certain em-

ployees excepted, however, from these regulations by Section 13(b)." Id. at 1062.

It is also to be noted that Section 18 only applies to employees whose maximum work week is lower than the maximum work week established by the FLSA. There is no maximum work week established by the FLSA for the Section 13(b)(1) employees. The United States Supreme Court in the said decision, also gave recognition to the consistent policy of Congress in establishing qualifications and hours of interstate transportation employees by The Hours of Service Act, The Seamens' Act and the Civil Aeronautics Authority which regulate the hours of service of railroad and airline employees and ships' crews. Id. at 1064.

During the consideration by Congress of the proposed MCA, both the Senate and the House of Representatives rejected proposals to fix specific hours of service for motor carrier safety employees and decided to leave the duty and power to establish such hours to the discretion of the I.C.C. This policy was adopted empowering the I.C.C. to control work hours to allow it "to be flexible to meet all labor situations", "to take into consideration all of the peculiarities and emergencies that exist in the motor-carrier industry", and to "adapt to the special conditions surrounding the different types and conditions of operation". (79 Cong.Rec. 5652, 12205, 12206)

Senator Hugo Black, co-author of the proposed FLSA and chairman of the Senate Committee on Education and Labor which reported the bill, stated during the debate on the legislation that "it was the policy of the Committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such a way as not to conflict with such regulation." That action, he stated, was taken with reference to maritime and railroad workers and an amendment was adopted during the debate to include "employees in aviation service" in the exemption of transportation employees' work hours from the considered bill. (81 Cong.Rec. 7875) Senator Black further advised: "It is my belief that it would certainly be unwise to have the hours of service regulated by two governmental agencies. I am further of the opinion that the Interstate Commerce Commission,

since it has the power and has exercised it, should be the agency to be entrusted with this duty." (81 Cong.Rec. 7875)

The comprehensive legislative scheme, enacted as the FLSA, was so pervasive that it preempted all state and local governmental controls over the wages and hours of all employees of the United States with very limited exceptions. Justice Owen Roberts, in discussing the effects of the landmark case, *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1940), which upheld the constitutionality of the FLSA, stated:

> "Of course, the effect of sustaining the Act was to place the whole matter of wages and hours of persons employed throughout the United States, with slight exceptions, under a single federal regulatory scheme and in this way, completely to supersede state exercise of the power in this field." Roberts, The Court and the Constitution, 56, 58 (1951)

In *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 320, 80 S.Ct. 739, 745, 4 L.Ed. 753 (1960), Justice Frankfurter described the effect of the federal control under the FLSA as being "the statutory scheme, so as to displace state regulation throughout the furthest reaches of the channels of interstate commerce" and that it acted as a "displacement of state power".

It is evident that this comprehensive and pervasive legislative program embodied in the FLSA superseded and displaced all state regulation inconsistent with the provisions of that statute and exempted the hours of service of all of the motor carrier safety employees included in Section 13(b)(1) of the Act (29 U.S.C. 213(b)(1)) from the control of any federal, state or municipal government or agency.

6. The California Superior Court erred in basing its opinion upon an improper interpretation and application of Section 18 of the FLSA (29 U.S.C. 218). It gave no consideration to the purpose of the statute as a whole, the intent of Congress in enacting the FLSA and related MCA which created two of the most comprehensive regulatory schemes ever considered by that body, pertinent court decisions and long established interpretation and application of the law over the past 48 years. As declared by this court, the FLSA "displaced state regulations throughout the

furtherest reaches of the channels of interstate commerce." *Mitchell v. H.B. Zachry Co.*, 80 S.Ct. at 745. The extent of this reach was demonstrated in an early and leading case involving the scope of the law, *Kirschbaum v. Walling*, 316 U.S. 517, 62 S.Ct. 1116, 86 L.Ed. 1639 (1942), in which the court concluded that maintenance, operating and janitorial employees of a six-story loft building, whose tenants manufactured ladies' garments that were shipped in interstate commerce, were covered by the FLSA.

Congress, in enacting this far reaching federal statute, excepted from its application the Section 13(b) employees for whom no "maximum work week was established." Thus, it granted governmental agencies, federal, state and municipal, permission to establish lower maximum work weeks but only for the employees for whom work weeks were established under the FLSA. Without this "savings clause", state and local governments would almost be completely barred from regulating the work hours of any employees. (*United States v. American Trucking Association, et al.*, supra)

It was manifestly the intent of Congress to occupy this field and grant the exclusive power of jurisdiction over the work hours of the excepted Section 13(b)(1) employees to the I.C.C. and D.O.T. and the State of California and its Division of Labor are precluded from exercising concurrent or joint control over such hours. As stated above, there is a paucity of judicial decisions involving attempts by states to control the hours of exempted motor carrier safety employees that is undoubtedly due to the long standing acceptance of exclusive jurisdiction of the I.C.C. and D.O.T. over this subject matter. Courts, however, have been required to resolve the same issue in comparable situations involving the work hours of railroad employees following the enactment of The Hours of Service Act. When the States of Washington and New York attempted to impose their maximum hours of service upon train crews of railroads, the United States Supreme Court held that the police power of a state could only exist from the silence of Congress upon the subject and cease when Congress acted or manifested its purpose to call into play its exclusive power. *Erie Railroad Co. v. New York*, (1914) 233 U.S. 671, 34 S.Ct. 756, 760, 58 L.Ed. 1149, 52 L.R.A. (N.S.) 266;

Northern Pacific Railway v. Atkinson, (1912) 222 U.S. 370, 32 S.Ct. 160, 161; *Long Island R. Co. v. Dept. of Labor of the State of New York*, (1931) 177 N.E. 17, 256 N.Y. 498.

It is to be noted that the State of California, under General Order 9-80, (App. B, infra, pp. 22-23) has assumed jurisdiction not only over the work hours of all motor carriers, but also railroad and airline employees, and seamen whose hours of service are within the control of respective federal agencies, although Section 3 thereof provides limited exemptions for certain motor carrier, rail and airline employees.

It is evident that the California Superior Court was persuaded by the appellee to isolate and apply Section 18 of the FLSA as though it existed in a vacuum. It concluded that Section 13(b) was unrelated to Section 18, which is manifestly contrary to the determination of this court in *United States v. American Trucking Association, et al.*, supra. The clear intent of Congress, as described above, was to enact a wage and hour regulatory scheme that completely occupied the field, "displaced state regulation" with "slight exceptions" and assigned to single federal agencies the exclusive control over the work hours of specified interstate transportation employees to the exclusion of all other "governmental agencies". The Superior Court, however, adopted the appellee's argument that other "government agencies" only applied to the single federal government agency which enforces the FLSA and not any other federal, state, municipal or local agency which would be free to take jurisdiction over the work hours of these employees. This conclusion was manifestly improper, illogical and contrary to the intent of Congress. As stated in the FLSA Congressional debates, "it would be certainly unwise to have the hours of service (of motor carrier safety employees) regulated by two government agencies." Whether the second agency would be federal, state or local is of no consequence as the problem sought to be avoided would be identical. (81 Cong.Rec. 7875)

Section 13(b)(1) (29 U.S.C. 213(b)(1)) of the FLSA as originally enacted in 1937 excepted from maximum hours regulation of any federal, state or municipal agency "any employee with respect to whom the I.C.C. (now the D.O.T.) has **power** to establish qualifications and maximum hours pursuant to Section

204 of the Motor Carrier Act of 1935." This language has been perpetuated without any substantive change for the past 48 years. It is clear, unequivocal and the California court should have applied the plain and literal meaning to that section. The basic insight concerning the process of statutory interpretation was expressed by the United States Supreme Court when it declared that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the court is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 917, 61 L.Ed. 442 (1917); Sutherland Statutory Construction (4th ed., Sands 1972), Section 46.08. Rather, the court disregarded the plain language and determined that the exception of motor carrier safety employees is effective only when the D.O.T. "has established maximum hours" for these employees. Obviously, if Congress wanted to employ that language in its statute, it would have done so.

In a principal case interpreting the applicability of Section 13(b) of the FLSA (29 U.S.C. 213(b)), *Morris v. McComb*, 332 U.S. 422, 68 S.Ct. 125 (1948), the United States Supreme Court concluded:

> "We hold that the Commission has the power to establish qualifications and maximum hours of service, pursuant to the provisions of Section 204 of the Motor Carrier Act, for the entire classification of petitioner's drivers and 'mechanics' and it is the existence of that power (rather than the terms of the requirements actually established by the Commission in the exercise of that power) that Congress has made the test as to whether or not Section 7 of the Fair Labor Standards Act is applicable to these employees.
>
> Congress has gone out of its way to make this purpose clear in cases comparable to the one before us."

See also *Levinson v. Spector Motor Freight Service*, supra, 67 S.Ct. at 936; *Marshall v. Union Pacific Motor Freight Co.*, (9th Cir. 1981) 650 F.2d 1085, 1089; *Newhouse v. Robert's Ilima Tours, Inc.*, (9th Cir. 1983) 708 F.2d 436; *Mulder v. Mendo Wood Products, Inc.*, 37 Cal.Rptr. 479, 484, 225 CA 2d 619

(1964) cert. den. 379 U.S. 844, 85 S.Ct. 85; *J.H. Rose Truck Line v. Ross*, 442 S.W. 483, 485 (1969); *Frito-Lay, Inc. v. Wisconsin Labor & Industry*, 209 N.W. 2d 551, 557 (1980); *Mingione v. New England Tallow*, 137 Conn. 173, 75 A.2d 383, 390 (1950); *Sherman v. Coastal Cities Coach Co.*, 66 A.2d 892 (N.J. 1949); *Garner v. Willers*, 68 N.W. 2d 900, 901 (S.D. 1955); *Robinson v. Barrow-Penn & Co.*, 194 Va. 632, 74 S.E. 2d 175, 177 (1953); *McLough v. Mallen*, 137 N.Y. Supp. 2d 523, 527, 528 (1954); *Vannoy v. Swift & Co.*, 210 S.W. 2d 350, 355 (Mo. 1947); *Broach v. McPherson*, 248 S.W. 2d 355 (Ark. 1952).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

DANIEL W. BAKER
Attorney for Appellant
Lodi Truck Service, Inc.

Dated: June 17, 1986

(Appendices follow)

APPENDIX A

OPINIONS BELOW

Superior Court of California,
County of San Joaquin
Appellate Division
No. 185633
Division of Labor Standards Enforcement,
Plaintiff,
vs.
Lodi Trucking Service, Inc.,
Defendants.
[Filed Feb. 6, 1986]

OPINION

Defendant, Lodi Trucking Service, Inc., (appellant herein) is a motor common carrier engaged in interstate as well as intrastate commerce. As such, it comes under the jurisdiction of both the Federal Fair Labor Standards Act and regulations of the California Industrial Welfare Commission pertaining to hours and wages of its employees.

Both the Fair Labor Standards Act (FLSA) and Industrial Welfare Commission (IWC) Order No. 9-80 (applicable to the transportation industry) contain provisions requiring the payment of time and one-half overtime compensation for hours of work over 40 hours per week. However, the FLSA contains an express exclusion of the applicability of this overtime provision to employees engaged in interstate commerce with respect to whom the Federal Secretary of Transportation has "power" to establish qualifications and maximum hours of service. (29 USC 213(b).)

Under the provisons of the Federal Motor Carrier Safety Act, the Secretary of Transportation "may" prescribe requirements for qualifications and hours of service of safety-of-operations employees of motor carriers engaged in interstate commerce. (49 USC 3102(b).)

Pursuant to this authority, the Secretary of Transportation has prescribed regulations in the Code of Federal Regulations for the hours of service of drivers. (49 CFR 395.1-395.13.) However, it

has *not* seen fit to prescribe such regulations for mechanics of motor carriers engaged in interstate commerce. (It is undisputed in this case that truck mechanics are safety-of-operations employees.)

IWC Order No. 9-80 expressly excludes the applicablity of its overtime provisions to employees whose hours of service are regulated by the Federal Department of Transportation under 49 CFR 395.1-395.13 (8 Administrative Code 11090(3)(H).) This means drivers only. There is no such exclusion in Order 9-80 as to truck mechanics.

Accordingly, the Division of Labor Standards Enforcement of the California Department of Industrial Relations (Respondent herein) undertook an investigation and concluded that Defendant, Lodi Trucking Service, Inc., owed overtime to its mechanic employees under the overtime provisions of Order No. 9-80. Suit was brought in Lodi Municipal Court, and the matter was submitted on a Stipulation of Agreed Facts, which shows that Defendant performed a self-audit and that it was stipulated that the sum of $14,831.77 would be owed to Defendant's mechanic employees (listed in Exhibit A to the Stipulation), if it was adjudged that Order No. 9-80 applied to them.

At the trial, Defendant asserted the defense of preemption by federal law of the applicability of the overtime provisions of Order No. 9-80 by reason of the express language in the Fair Labor Standards Act and the Motor Carrier Safety Act giving the Secretary of Transportation the power and authority to prescribe regulations for the hours of service of mechanics, even though such power remains unexercised and there is presently no federal regulation of the hours of service of mechanic employees of motor common carriers.

The trial court concluded that there was no preemption and that the overtime provisions of Order No. 9-80 applied to Defendant's mechanic employees. Judgment was entered against Defendant accordingly in the sum of $14,831.77, Defendant appeals from this judgment.

Defendant's sole contention on this appeal (as was asserted at the trial level) is that the unexercised power of the Secretary of

Transportation under the FLSA and the MCSA to regulate the hours of service of all safety-of-operation employees of common motor carriers (which includes truck mechanics) preempts the overtime provisions of IWC Order No. 9-80.

Defendant relies primarily upon two 1947 decisions of the United States Supreme Court (*Levinson v. Spector Motor Service,* 330 U.S. 649, 67 S.Ct. 931, and *Morris v. McComb,* 332 U.S. 422, 68 S.Ct. 131), in which it was held that the overtime provisions of the Fair Labor Standards Act (FLSA) did not apply to safety-of-operation employees of interstate motor carriers to whom the Interstate Commerce Commission under the Motor Carrier Act of 1935 (the predecessor to the Secretary of Transportation under the Motor Carrier Safety Act) may prescribe regulations for hours of service even though such power to regulate had not been exercised.

However, these decisions did not involve the question of preemption of state law by federal law. Both actions were brought under the FLSA itself, rather than under some state law or regulation, and the ultimate conclusion drawn was simply that, as between two acts of the United States Congress, there was no concurrent jurisdiction over safety-of-operation employees by reason of the express language used in Section 13(b) of the FLSA (29 USC 213(b)). The purpose of this exclusion in the FLSA as to the applicability of overtime provisions under the jurisdiction of the Department of Labor to employees under the jurisdiction of the Secretary of Transportation was to avoid inconsistent provisions in Congress's own enactments. There is no such inconsistency as between an unexercised power of a federal agency and a state overtime regulation.

The basic test of preemption of state law by federal law is whether Congress has manifested a "clear intent" to preempt.

Applying that test here, we conclude that Congress, in enacting the Fair Labor Standards Act (FLSA), has manifested a "clear intent" *not* to preempt state law as to hours and wages of employees engaged in intrastate as well as interstate commerce, when state law provides greater protection to such employees than FLSA, by imposing a higher minimum wage or a shorter maxi-

mum hours of employment. Section 18 of the FLSA (29 USC 218(a)) so provides in stating as follows:

> "(a) No provision of this Act or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Act or a maximum workweek lower than the maximum workweek established under this Act. . . ."

The courts of at least three states (including California) have relied upon this savings clause in the FLSA in holding that their state overtime laws have not been preempted by the FLSA since they have established labor conditions of higher standards that required by federal law. (*Skyline Homes v. Department of Industrial Relations,* 165 Cal.App.3d 239; *Rivera v. Division of Industrial Welfare,* 265 Cal.App.2d 576; *Webster v. Bechtel, Inc.,* (Alaska, 1980) 621 P.2d 890; *Plouffe v. Farm and Ranch Equipment Co.,* (Montana, 1977) 570 P.2d 1106.)

In addition, there is a provision in the Code of Federal Regulations (29 CFR 778.5) which provides that the payment of overtime compensation computed under state law on bases different from those set forth in the Fair Labor Standards Act does not contravene the requirement of the Fair Labor Standards Act, and nothing in that Act or the regulations pertaining thereto should be taken to override or nullify such provisions of state law.

Needless to say the overtime provisions of IWC Order No. 9-80 as applied to safety-of-operation employees in the transportation industry such as the truck mechanics of defendant, provides greater protection to such employees than provided by federal law when there is no provision at all for overtime compensation under federal law.

Accordingly, we reject the preemption contention of Defendant.

The judgment is affirmed.

DATED: February 6, 1986.

/s/ KENNETH FERGUSON
Kenneth Ferguson
Presiding Judge of the Appellate Department of the Superior Court

I concur:
/s/ NELS B. FRANSEN
Nels B. Fransen
Judge of the Superior Court

Superior Court Of California,
County Of San Joaquin

Appellate Division

No. 185633

Division of Labor Standards Enforcement,
Plaintiff,

v.

Lodi Trucking Service, Inc.,
Defendant.

[Filed Feb. 25, 1986]

Order

The petition for a rehearing filed February 20, 1986 is hereby denied.

Dated: February 25, 1986.

/s/ KENNETH FERGUSON
Kenneth Ferguson
Presiding Judge of the Appellate Department
of the Superior Court

I concur:

/s/ NELS B. FRANSEN
Nels B. Fransen
Judge of the Superior Court

Superior Court Of California,
County Of San Joaquin

Appellate Department

No. 185633

Division of Labor Standards Enforcement,
Plaintiff,

v.

Lodi Trucking Service, Inc.,
Defendant.

[Filed Feb. 25, 1986]

CERTIFICATION TO COURT OF APPEAL

This Court hereby certifies the within case for transfer to the Court of Appeal, Third Appellate District, to secure uniformity of decision and to settle important questions of law, and states:

(1) There was no trial in the Superior Court. Rather, this was an appeal by Defendant, Lodi Trucking Service, Inc., from a Judgment of the Lodi Municipal Court in the principal sum of $14,831.77, representing overtime compensation owing to Defendant's truck mechanic employees by reason of a finding of that Court that Defendant, a motor common carrier engaged in interstate as well as intrastate commerce, was subject to the overtime provisions of Order No. 9-80 of the California Industrial Welfare Commission, which Order is applicable to the transportion industry.

It was Defendant's contention at the trial level, as well as on this appeal, that the overtime provisions of Order No. 9-80 were preempted by federal law, namely, the Fair Labor Standards Act (29 USC 213(b)) and the Motor Carriers Safety Act (49 USC 3102(b)).

(2) In an opinion filed February 6, 1986, this Court concluded that the overtime provisions of Order No. 9-80 were not preempted by federal law, and affirmed the judgment of the Lodi Municipal Court.

(3) Within the time prescribed by Rule 107 of California Rules of Court, Defendant filed a Petition for Rehearing on February 20, 1986, which petition was denied by this Court on February 25, 1986. By reason of the filing of such Petition for Rehearing, the opinion of this Court did not become final until March 8, 1986. This Certification is therefore being timely made pursuant to Rule 63(c) of California Rules of Court.

(4) This Court's opinion adverse to Defendant's preemption contention appears to constitute a decision of first impression insofar as safety-in-operation employees of motor common carriers engaged in both interstate and intrastate commerce is concerned. In view of Defendant's contention that this Court's opinion runs counter to the decision of the United States Supreme Court in *United States v. American Trucking Association* (1940), 310 US 543, 60 S.Ct. 1059, as well as the provisions of the Fair Labor Standards Act and the Motor Carriers Safety Act, it is felt that such an important decision of first impression should be reviewed and finally ruled upon by a higher Court than this.

DATED: March 11, 1986.

* * ILL * *
Kenneth Ferguson, Presiding Judge
Appellate Department

/s/ NELS B. FRANSEN
Nels B. Fransen, Judge
Appellate Department

/s/ STEPHEN G. DEMETRAS
Stephen G. Demetras, Judge
Appellate Department

In the
Court of Appeal of the State of California
in and for the
Third Appellate District

3 Civil 26065
San Joaquin 185633

Division of Labor Standards Enforcement,
Plaintiff and Respondent,

vs.

Lodi Trucking Service, Inc.,
Defendant and Appellant.

[Filed Mar. 27, 1986]

By the Court:
A transfer on certification is denied.
Dated: March 27, 1986
Puglia, P.J.

Division of Labor Standards
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Municipal Court of California,
County of San Joaquin
Lodi Judicial District

Case No. MC-09122

Division of Labor Standards Enforcement et al.,
Plaintiff(s)

vs.

Lodi Trucking Service, Inc., et al.,
TN: Lodi Truck Service, Inc, et al.,
Defendant(s)

Statement of Decision

Plaintiff by this action seeks a judgment for wages on behalf of mechanics employed by defendant, based on the minimum wage schedules for overtime work as set forth in Industrial Welfare Commission Order 9-80 (hereafter IWC 9-80). Defendant denies liability alledging operations under Interstate Commerce Commission (hereafter ICC) licensing that are exclusively regulated by federal authorities. The matter came regularly before the Court for trial by Court, a jury not being requested, and both parties appeared by counsel. The case was submitted to the Court on a Stipulation of Agreed Facts and Trial Briefs by each side. The Court has reviewed the pleadings, briefs, cases cited and stipulated facts and is now prepared to render its statement of decision.

Based on the pleadings and fact stipulation the Court finds as follows:

that defendant is a for-hire common carrier operating in Interstate and Foreign Commerce situations under ICC permits and in Intrastate situations under Public Utilities Commission (hereafter PUC) authority;

that defendant employs mechanics to perform maintenance, repairs and service at shops in Lodi (this jurisdiction) and Modesto, Stanislaus County, California;

that services and checks are performed per Federal Department of Transportation (hereafter DOT) Safety Regulations and written reports are prepared;

that if IWC order 9-80 applies to defendants mechanic employees, defendant would owe a total of $14,831.77 to be divided among seventeen (17) individual mechanics for overtime compensation;

and that IWC order 9-80 has previously been challenged and upheld but on grounds other than those before the Court.

The issues presented in this case revolve around two major subject areas:

First, the Federal-State regulation issue, if there is individual or concurrent regulatory power and if there is federal jurisdiction reserved whether it has been exercised;

and Second whether the first issue is precluded by res judicata due to the case of Industrial Welfare Commission v. Superior Court (1980) 27 Cal 3rd 690 (hereafter IWC v. Sup. Ct.).

To address the second issue first, the Court concludes that defendant is not precluded from the defense stated based on principles of res judicata. IWC v. Sup. Ct. is an original jurisdiction case heard by the Supreme Court, involving four separate challenges to wage orders, to provide a prompt and definitive resolution to numerous common issues. It can be argued that defendant was privil to the action since defendant was a member of an association which acted as plaintiff in one of the involved matters, California Trucking Association et al. v. IWC, Kings County Superior Court No. 31321. However, the questions posed, whether because of original pleadings (separate type of proceedings and remedy sought) or removal (common questions were of main import) were quite different from the issues herein stated. In Calif. Trucking v. IWC the specific transportation industry issues were whether the Occupational Safety and Health Standard Board (Cal OSHA) had sole jurisdiction rather than concurrent jurisdiction with IWC and also whether labor relations

statutes precluded the setting of minimum standards on subjects left to collective bargaining.

The Court concludes that defendant can not be bared from the advanced defense in this case based on principles of res judicata due to tenuous privity and separateness of issues.

Addressing the primary issue of this case, the Court concludes that federal agencys have the authority to regulate the working conditions of the subject employees, that the federal agencys have not exercised this authority to date, that state agency regulation has not been preempted, that state regulation is proper for the health and welfare of the subject employees and that there is no inherent conflict in the separate state-federal regulatory schemes.

In reaching its conclusion the Court notes that federal authority has an interest in protecting the peace and continuity of commerce; that federal regulatory power has been exercised with respect to common and contract carriers by vehicle since 1935; that the intent of federal legislation was to mandate safety regulations; that the Secretary of Transportation "may" prescribe requirements for "qualifications and maximum hours of service of employees . . . a motor carrier" (U.S. Code 3102(b)(1)); and that federal regulations have been enacted covering drivers of vehicle engaged in interestate commerce.

Likewise the Court notes that state authority has an interest in promulgating health regulations and safety provisions for the welfare of employees; that federal labor laws do not preempt the field of regulating working conditions; that such rules are presumed to be reasonable and lawful; that such rules are to be given a liberal interpretation to promote the desired ends; that IWC order 9-80 exempts "drivers" which are covered by federal regulations; that federal Department of Transportation regulations detail the work to be done by mechanics but not the hours or working conditions and that the Department of Transportation has the authority to regulate mechanic work hours and conditions but has not done so.

The Court concludes that state control is preempted where there is either a clear and manifest intent to preempt or there is an inherent conflict, neither of which is present in this case; that the

unexercised authority to regulate does not preempt regulation; that the state authority is not precluded from establishing minimum wages, maximum hours or standard conditions to protect the health and welfare of employees by either state or federal law; and that in the absence of actual conflict the IWC is permitted to regulate the working conditions of the employees in this action.

The Court therefore upholds IWC Order 9-80 as it applies in this case and orders Judgment be entered in favor of Plaintiff in the amount of $14,831.77, plus interest at the legal rate from the date of filing of this complaint, plus costs of suit. Counsel for plaintiff is requested to prepare and submit formal judgment in accordance with this statement of decision.

/s/ ROBERT F. BAYSINGER
Robert F. Baysinger, Judge
Lodi Municipal Court

Dated: 4/22/85

Louis Giannini, Chief Counsel
Division of Labor Standards Enforcement
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Attorney for Labor Commissioner

Municipal Court, State of California
Lodi Judicial District, County of San Joaquin

No: 09122

Division of Labor Standards Enforcement
Department of Industrial Relations
State of California,
Plaintiff,

vs.

Lodi Trucking Service, Inc., a
California Corporation, Does I-X,
Defendant.

[Filed April 30, 1985]

JUDGMENT

This matter came on for hearing on March 14, 1985 at 9:30 a.m. Plaintiff, Division of Labor Standards Enforcement was represented by Patricia K. Poyner and Defendant Lodi Trucking Service, Inc. et al. was represented by Ara Shirinian. The case was submitted to the Court on a stipulation of Agreed Facts and Trial Briefs.

The court has reviewed the pleadings and stipulations and issued a Statement of Decision on April 22, 1985. Based on the above;

It Is Hereby Ordered And Decreed that Plaintiff shall have judgment against Defendant Lodi Trucking in the sum of $14,831.77.

Dated: April 30, 1985

ROBERT F. BAYSINGER, Judge
Lodi Municipal Court

/s/ Robert F. Baysinger
Judge of the Lodi Municipal Court

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Appellate Department of the Superior Court
of the State of California
In and for the County of San Joaquin

Case No. 185633

(Lodi Municipal Court No. 09122)

Division of Labor Standards Enforcement,
Department of Industrial Relations,
State of California,
Plaintiff and Respondent,

vs.

Lodi Truck Service, Inc.,
Defendant and Appellant.

Notice of Appeal to
the Supreme Court of the United States

Notice is hereby given that Lodi Truck Service, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the judgment of February 6, 1986 affirming the order of the Municipal Court, State of California, Lodi Judicial District, County of San Joaquin entered in this action which became a final judgment of the court by the denial of the certification to the Court of Appeal by the order of the Court of Appeal of the State of California in and for the Third Appellate District in Proceeding No. 3 Civil 26065 on March 27, 1986.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Dated: June 6, 1986

Respectfully submitted,
Handler, Baker, Greene & Taylor

/s/ DANIEL W. BAKER
Daniel W. Baker
Attorneys for Lodi Truck Service, Inc.

Proof of Service by Mail

I declare that I am a resident of and employed in the City and County of San Francisco, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 333 Market Street, Suite 2277, San Francisco, California 94105. On June 6, 1986, I served the attached

Notice of Appeal to the Supreme Court
of the United States

in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

John K. Van De Kamp, Attorney General
of the State of California

James B. Cuneo
Deputy Attorney General
6000 State Building
350 McAllister St.
San Francisco, CA 94102

Patricia K. Poyner, Esq.
Division of Labor Standards
2422 Arden Way, Suite #50
Sacramento, CA 95825

Louis Giannini, Esq.
Division of Labor Standards
525 Golden Gate Ave., #606
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at San Francisco, California.

Dated: June 6, 1986

/s/ DANIEL W. BAKER
Daniel W. Baker

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Article I, Section 8, Clause 3 of the United States Constitution provides that:

> "Congress shall have the power to . . . regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;"

Article VI, Clause 2 of the United States Constitution provides:

> "This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding."

Amendment XIV, Section 1 of the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 213 of the Fair Labor Standards Act (29 U.S.C. § 213) provides in pertinent part:

> "(b) The provisions of section 207 of this title shall not apply respect to—
>
> > (1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or

(2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act [49 U.S.C.A. § 1 et seq.]; or

(3) any employee of a carrier by air subject to the provisions of the Railway Labor Act [45 U.S.C.A. § 181 et seq.]; or . . . ."

Section 218 of the Fair Labor Standards Act (29 U.S.C. § 218) provides in pertinent part:

"(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. . . ."

Section 3102[1] of the Department of Transportation Act (49 U.S.C. § 3102) provides in pertinent part:

---

[1] The Motor Carrier Act of 1935 granted the Interstate Commerce Commission power "to establish reasonable requirements with respect to qualifications and maximum hours of service of employees and safety of operation and equipment of common and contract carriers of motor vehicles." 49 U.S.C. § 204(a)(1)(2). In 1966, the Department of Transportation was enacted which established the Department of Transportation and the control of the maximum hours of service of safety of operation employees of motor carriers was assigned to that agency. The language formerly in 49 U.S.C. § 204(a)(1)(2) was transferred without change to 49 U.S.C. § 1655(e)(6)(C). Public law 97-449, passed in 1983, recodified sections of the Department of Transportation Act to restate the laws, without substantive change. By the recodification, the Department of Transportation's authority over the "qualifications and maximum hours of service of employees of, and safety of operation of equipment of, a motor carrier is in 49 U.S.C. § 3102(b)(1).In 128 Cong. Rec. H9543, December 13, 1983, (Pub. L. 97-449, 96 Stat.

"(a) This section applies to transportation—

(1) described in sections 10521 and 10522 of this title; and

(2) to the extent the transportation is in the United States and is between places in a foreign country, or between a place in a foreign country and a place in another foreign country.

(b) The Secretary of Transportation may prescribe requirements for—

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and . . . ."

Section 1178 of the Labor Code of the State of California provides:

"If after investigation the commission finds that in any occupation, trade or industry, the wages paid to employees may be inadequate to supply the cost of proper living, or that the hours or conditions of labor may be prejudicial to the health, morals, or welfare of employees, the commission shall select a wage board to consider any of such matters and transmit to such wage board the information supporting its findings gathered in the investigation. Such investigation shall include at least one public meeting."

Section 1178.5 of the Labor Code of the State of California provides in pertinent part:

"(b)If the commission finds that hours or conditions of labor may be prejudicial to the health or welfare of employees in any occupation, trade or industry, it shall select a wage

---

2413), it is stated, as with other recodifications of the United States Code, "This bill makes no substantive change in the law. The changes in the terminology and style do not result in any changes in substance or impair the precedent value of the earlier judicial decisions and other interpretation." *Steward v. Kahn,* 11 Wall 403, 502 (1871); *United States v. Ryder,* 110 U.S. 729, 740 (1884); *Santa Fe Railroad Co. v. United States,* 617 F.2d 485, 490, 491 (7th Cir. 1980); Sutherland, Statutory Construction, (4th ed., Sands 1972), Sections 28.10, 28.11.

board composed of an equal number of representatives of employers and employees in the occupation, trade or industry in question, and a nonvoting representative of the commission, designated by the commission, who shall act as chairperson. The wage board shall consider the findings of the commission and such other information it deems appropriate and report to the commission its recommendation as to what action should be taken by the commission with respect to the matter under consideration . . ."

Title 8, Section 11090 of the Administrative Code of the State of California provides in pertinent part:

"11090. Order Regulating Wages, Hours and Working Conditions in the Transportation Industry.

1. Applicability of Order. This Order shall apply to all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis, except that: . . .

* * *

(D) Except as provided in Sections 4, 10, 11, 12, and 20 through 22, this Order shall not be deemed to cover those employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act, 42 U.S.C. sections 151 et seq. . . .

* * *

2.(C) "Transportation Industry" means any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air or water, and all operations and services in connection therewith; and also includes storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles.

* * *

3. Hours and Days of Work.

(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are required by law to attend school; such employees shall not be employed more than eight (8) hours in

any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek . . .

* * *

(H) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Administrative Code Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers . . .

* * *

(J) The provisions of this section shall not apply where any employee of an airline certificated by the federal or state government works over forty (40) hours but not more than sixty (60) hours in a workweek due to a temporary modification in the employee's normal work schedule not required by the employer but arranged at the request of the employee, including but not limited to situations where the employee requests a change in days off or trades days off with another employee."

APPENDIX C

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Telephone: 415/495-5050

Attorneys for Defendant
Lodi Truck Service, Inc.

Municipal Court, State of California,
Lodi Judicial District, County of San Joaquin

Case No. 09122

Division of Labor Standards Enforcement,
Department of Industrial Relations,
State of California
Plaintiff,
v.
Lodi Trucking Service, Inc., a
California Corporation, Does I through X,
Defendants.

Stipulation of Agreed Facts

The undersigned agree that this action may be tried by this court without a jury and that judgment may be rendered on pleadings filed in this action and on the following statement of agreed facts which serve as a substitute of evidence of those facts.

Lodi is a for-hire motor common carrier which holds out and provides transportation services for the general public, in interstate and foreign commerece, between all points in the States of California, Arizona, Colorado, Nevada and Utah. That service is performed under a certificate of public convenience and necessity issued to Lodi by the Interstate Commerce Commission ("ICC") in Docket No. MC-107104. It also conducts intrastate motor common carrier operations within the State of California under authorities received from the California Public Utilities Commission.

Vehicle maintenance and service shops are located at Lodi's Lodi and Modesto facilities. The fleet of equipment utilized in Lodi' s operation includes 91 tractors, 3 trucks and 410 trailers, which include flatbed, van type and refrigerated units of various sizes and designs. To perform the maintenance, repairs and servicing of its vehicles, Lodi employs throughout the year between five and nine mechanics at the Lodi shop and four to seven mechanics at the Modesto facility. Each power and trailing unit undergoes a complete maintenance and safety systematic investigation each month, and a written record of the results thereof must be compiled, as required by the Bureau of Motor Carrier Safety, Federal Highway Administration, Department of Transportation ("DOT") (49 C.F.R. § 396). Additionally, the personnel of Lodi must, under the DOT Safety Regulations, make daily inspections and prepare written reports of the condition of each power and trailing unit that is operated, including, but not limited to, steering mechanism, brakes and connections, lighting devices and reflectors, tires, windshield wipers, rear view mirrors, coupling devices, wheels and rims, and emergency equipment. (49 C.F.R. § 396.11) If any repair or maintenance is found necessary, as a result of the monthly or daily inspections, it must be immediately done and the mechanic who performs the work must certify on the report that the deficiency has been corrected. The DOT Safety Regulations prescribe and Lodi's mechanics must be conversant with the requirements and specifications of the parts and accessories necessary for safe operations and their installation and maintenance. This equipment includes lamps and reflectors, turn signals, wiring and installation, grounds, battery installation, overload protective devices, brake systems, emergency brakes, breakaway systems, brake tubing, lining, valves, reservoirs and hoses, warning devices and gauges, glazing, window construction and markings, fuel systems, coupling devices, tires, heaters, windshield wipers, defrosting devices, speedometer, exhaust systems, rear-end protection and vehicle interior noise levels (49 C.F.R. §§ 393.1-393.94). Additionally, during business peaks, this fleet is augmented by vehicles of between 110 and 125 contract owner-operators that must be maintained, as required, by Lodi's mechanics.

All of the mechanics of Lodi, whether located at Lodi or Modesto, are classified and employed as "general mechanics". Their work requires them to have broad training and experience as they must perform the work that is required for whatever power or trailing unit assigned to them. It embraces making the DOT vehicle inspections and completion of forms, as previously described, doing the maintenance, repairs or correcting any of the deficiencies noted in the daily or monthly records, and certifying that the work has been done. The scope of their work, whether corrective or preventive, directly involves all of the parts and accessories and their installation and maintenance listed in the DOT's regulations as being essential to the safety of vehicles on the highways. The mechanics' duties include not only the responsibility for the equipment, set forth in the regulations, but other parts and accessories necessary for safe highway operations, such as the vehicle frames, springs, spring hangers, fuel tanks, starters, ignition, motors, transmissions, differentials, fifth-wheels, the hooking up of tractors and trailers and hoses, lights and brake connections, and the tie-down assemblies, accessories and equipment necessary to protect against shifting or falling cargos while in transit.

Before it became effective, the promulgation of IWC Order 9-80 was challenged by the California Trucking Association (CTA) in a State Superior Court action in Kings County. That action was consolidated for hearing at the California Supreme Court along with other challenges by other parties to other IWC orders (see *Industrial Welfare Commission v. Superior Court,* (1980) 27 Cal.3d 690, cert. den. 449 U.S. 1029 (1980).) Preemption by federal laws was not used by CTA as a basis to challenge Order 9-80 in that proceeding. Challenges were rejected and the validity of the IWC Order was sustained. Lodi was a dues paying member of the CTA at the time the challenge was filed.

Attached hereto as Exhibit "A" is a list of mechanic employees and the amount of overtime owed to each, if any. Lodi performed a self-audit to arrive at these figures.

The self-audit was based on IWC Order 9-80 (8 Cal. Administrative Code § 11460—attached as Exhibit "B") which covers the Transportation Industry. The appropriate overtime rate for the Lodi mechanics is found in Section 3 of that Order, if applicable. Based on IWC Order 9-80 §§ 3(A)(1) and (2), the total owed the mechanics would be $14,831.77.

DATED: March 11, 1985

Approved:

/s/ PATRICIA K. POYNER
PATRICIA K. POYNER
Attorney for Plaintiff

/s/ ARA SHIRINIAN
ARA SHIRINIAN
Attorney for Defendant

EXHIBIT "A"

Doug Bauman	$ 1,051.02
Mark Brewer	146.63
Mark Ewing	1,265.07
Don Lee	882.00
Ken Lee	3,077.05
Steve Silva	3,301.61
John Kendall	1,655.18
Brian Salaices	369.31
Doug Benson	13.81
Dick Guard	292.19
Steve Williams	159.63
Jim Beasley	38.82
Odell Brewer	155.19
Mike Knight	1,024.69
Terry Lopez	1,146.51
Nat Green	26.81
Robert Hughes	226.25
	$14,831.77

Supreme Court, U.S.
FILED
JUL 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LODI TRUCK SERVICE, INC.,
Appellant,

vs.

DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA
Appellee.

On Appeal from the Superior Court of the State of California, County of San Joaquin, Appellate Department

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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10/12

QUESTION PRESENTED

Is there a substantial federal question regarding jurisdiction of the State of California to regulate overtime pay to mechanics in the face of the unexercised statutory authority of the United States Secretary of Transportation to prescribe requirements for qualifications and maximum hours of service of such class of employees?

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No. 85-2112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LODI TRUCK SERVICE, INC.,
Appellant,

vs.

DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA
Appellee.

On Appeal from the Superior Court of the State of California, County of San Joaquin, Appellate Department

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the California Superior Court on the ground that this case does not present a substantial federal question.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Appellant has challenged the jurisdiction of the California Department of Industrial Relations to promulgate, and the California Division of Labor Standards Enforcement to enforce, Industrial Welfare Commission Order No. 9-80 to the extent that it prescribes payment of overtime to persons who are employed as mechanics in the transportation industry in the State of California

where an employer trucking company is engaged in interstate commerce. This appeal follows judgment from the Municipal Court of California for the County of San Joaquin, Lodi Judicial District, in favor of the California Division of Labor Standards Enforcement ordering appellant to pay overtime wages to mechanics in the amount of $14,831.77 plus interest and costs of suit.

The judgment was affirmed by the Appellate Department of the Superior Court of the State of California for the County of San Joaquin and certification for further appellate review was denied by the California Court of Appeal in and for the Third Appellate District. Copies of the judgment of the Municipal Court, appellate decision of the Superior Court appellate Department and denial of certification by the Court of Appeal are included as appendices to the Jurisdictional Statement which has been filed on behalf of appellant.

Appellant employer contends that any state regulation of the hours of mechanics who are employed by California carriers which are engaged in interstate commerce is preempted by provisions of the Federal Department of Transportation Act, which authorize the Secretary of Transportation to prescribe requirements for qualification and hours of service of safety-of-operations employees of motor carriers engaged in interstate commerce. In support of this contention, appellant relies upon case authority which stands for the proposition that, as between two federal regulatory schemes, there is no concurrent regulatory authority. Appellees maintain that, absent any federal regulation or conflict between federal and state regulatory authority, the exercise of state police power governing hours and wages of mechanics in the transportation industry is not preempted.

ARGUMENT

THE AUTHORITY OF THE STATE OF CALIFORNIA TO REGULATE PAYMENT OF OVERTIME TO MECHANICS IS NOT PREEMPTED BY THE UNEXERCISED REGULATORY AUTHORITY OF THE SECRETARY OF TRANSPORTATION PURSUANT TO THE FEDERAL DEPARTMENT OF TRANSPORTATION ACT

Title 49 U.S.C. section 3102(b) authorizes the Secretary of Transportation to prescribe requirements for qualifications and maximum amount of service of safety-in-operation employees of motor carriers engaged in interstate commerce. Pursuant to this authority, the Secretary has prescribed regulations governing the hours of service of drivers. 49 C.F.R. 395.1-395.13. Of critical significance to this appeal, however, is the fact that the Secretary has prescribed no regulations governing the hours of mechanics of motor carriers engaged in interstate commerce.

California Industrial Welfare Commission Order No. 9-80, codified as Title 8, section 11090 of the Administrative Code of the State of California, governs wages, hours, and working conditions of persons employed in the transportation industry within the State of California. In pertinent part, subsection (H) of such Order provides as follows:

> "The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, . . . "

It is established beyond question that state law is preempted by federal legislation only where there is a clear and manifest congressional indication of intent to preempt the field or where there is an inherent conflict between federal and state law. *Malone v. White Motor Corp.*, 435 U.S. 151, 157-158 (1958); *New York Department of Social Services v. Dublino,* 413 U.S. 405, 414 (1973); *Terminal Association v. Trainmen,* 318 U.S. 1, 6-7 (1943). Where a state's exercise of its police powers is challenged under the Supremacy Clause, established authority dictates that historic police powers of the state are not to be

superseded by federal legislation absent a "clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

A conflict between federal and state law, as a basis for preemption, will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In the absence of a persuasive demonstration by appellant employer that Congress has intended to prohibit non-conflicting state regulation, or that an actual conflict between federal and state regulations exists, state regulation is permissible.

It is equally well established that Congressional delegation of *authority* to regulate, absent the exercise of such authority in a manner which conflicts with state regulation, does not preempt state regulations. In *Welch Co. v. New Hampshire*, 306, U.S. 79 (1939), this court held that the enforcement of state law governing the activities of an interstate motor carrier subsequent to the passage of Federal Motor Carrier Act of 1935, but prior to the effective date of a regulatory order of the Interstate Commerce Commission, was permissible. *Id.* at pp. 84-85. This court has subsequently repeatedly sustained state regulation of commerce-related activity where federal agencies have been authorized to regulate but have failed to exercise such authority. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-172 (1978); *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960); *Service Transfer Co. v. Virginia*, 359 U.S. 171, 179 (1959); *Bethlehem Co. v. State Board*, 330 U.S. 767, 773 (1946). See also *Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n.* 461 U.S. 375, 387-389 (1983).

The principal authorities upon which appellant relies are cases which have involved the issue of concurrent federal regulatory authority under the Fair Labor Standards Act and the Motor Carriers Act of 1935. See *Morris v. McComb*, 332 U.S. 422 (1948); *Levinson v. Spector Motor Co.*, 330 U.S. 631 (1947); *United States v. American Trucking Assns.*, 310 U.S. 534 (1940).

None of these cases concerned the issue of preemption of state regulation based upon the existence of unexercised federal regulatory authority. Such cases are therefore readily distinguishable from the instant case.

In light of the foregoing argument and authority, it is apparent that the issue presented by this appeal has been so explicitly foreclosed by prior decisions of this court as to leave no room for real controversy. Under these circumstances, the issue presented by appellants is deemed insubstantial and proper cause for dismissal of the appeal. *Palmer Oil. Corp. v. Amerada Corp.*, 343 U.S. 390, 391 (1952); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

Nor is the pendency of other federal and state court cases involving the issue presented by this appeal persuasive with regard to the significance of such issue. All of the federal cases cited at page 7 of the jurisdictional statement have been filed by counsel for appellant. The other pending state court cases also referenced by appellant are enforcement proceedings of the nature of the instant case. Several of such cases involve the same trucking companies on behalf of whom counsel for appellant has filed actions for declaratory relief in the United States District Court for the Northern District of California.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the court should dismiss the appeal or, in the alternative, affirm the decision of the California Superior Court.

Dated: July 18, 1986

Respectfully submitted,

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JAMES B. CUNEO
Deputy Attorney General
Attorneys for Appellee

Supreme Court, U.S.
FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2112

IN THE
Supreme Court of the United States
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LODI TRUCK SERVICE, INC.,
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v.

DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA,
Appellee.

On Appeal from the Superior Court of the State of California County of San Joaquin, Appellate Department

---

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Does the decision of the Superior Court of the State of California, County of San Joaquin, finding that the Industrial Welfare Commission Orders of the State of California regulating overtime wages of mechanics employed in interstate commerce are not pre-empted by the provisions of Section 3102(b)(1) of Title 49 U.S.C. (the Department of Transportation Act) present a substantial federal question?

If the decision of the Superior Court finding that the provisions of the Industrial Welfare Commission regulating overtime wages of mechanics does present a substantial federal question, should the judgment be affirmed based upon the fact that the question was properly determined by the court below?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2112

LODI TRUCK SERVICE, INC.,
Appellant,

v.

DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA,
Appellee.

On Appeal from the Superior Court of the State of California County of San Joaquin, Appellate Department

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MOTION TO DISMISS OR AFFIRM

Appellee, Division of Labor Standards Enforcement [1], pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Honorable Court to dismiss this appeal based upon the ground that this case does not present a substantial federal question, or, in the alternative, to affirm the judgment of the Appel-

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[1] The attorneys for the Labor Commissioner are the attorneys of record in this case and represent the Labor Commissioner, Chief of the Division of Labor Standards Enforcement, in all matters involving wages, hours and working conditions of employees pursuant to applicable law. (See California Labor Code section 98.3).

late Department of the Superior Court of California, San Joaquin County, based upon the ground that the federal question raised below was correctly decided.

INTRODUCTION

This case was tried in the Municipal Court of the Lodi Judicial District, County of San Joaquin, State of California, and resulted in a judgment in favor of appellee, Division of Labor Standards Enforcement, in the amount of $14,831.77 representing overtime wages owed to mechanics employed by the appellant. The judgment was affirmed on appeal to the Appellate Department of the Superior Court of the County of San Joaquin and this appeal followed.

Appellant herein contends that the provisions of the Department of Transportation Act[2], 49 U.S.C. 3102(b)(1) which provides that the Secretary of Transportation shall have the authority to prescribe requirements for, *inter alia*, maximum hours of service of "safety of operation" employees of motor carriers engaged in interstate commerce, have the effect of preventing the State of California, through its Industrial Welfare Commission Orders, from regulating the payment of overtime to such employees.

The main thrust of appellant's argument in this appeal is that the Superior Court did not consider the intent of Congress which, according to the appellant, was to exempt the employees covered by 49 U.S.C. 3102(b)(1) from the overtime regulations of state and municipal laws. According to appellant's theory, Congress manifested this intent when it chose to exempt such safety of

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[2] The Department of Transportation Act provisions regarding the right of the Secretary of Transportation to regulate the hours of safety of operation employees is a recodification of the powers originally bestowed by Congress on the Interstate Commerce Commission in the Motor Carrier Act of 1935.

operation employees from the overtime provisions of the Fair Labor Standards Act (29 U.S.C. 213(b)).

As will be demonstrated, the position of appellant is clearly erroneous. There is no showing that Congress ever intended that even if the Secretary of Transportation were to exercise his authority to regulate such hours, that such regulation would preclude the several states from exercising their police powers to regulate the rate of pay which must be paid to such employees for hours in excess of eight in any one day or forty in any one week. Additionally, more than fifty years after the passage of the original legislation conferring the power, first upon the Interstate Commerce Commission and subsequently upon the Secretary of Transportation, neither federal agency has found it necessary to the safety of the nation's highways to regulate the hours of mechanics.

ARGUMENT

The Intent of Congress to Pre-empt Regulations Adopted By States Under The Police Powers May Not Be Inferred But Must Be Definitely Expressed

The appellant contends that the unexercised power of the Secretary of Transportation contained in the Department of Transportation Act (49 U.S.C. 3104(b)(1)) to regulate the hours of mechanics and other safety of operation employees precludes the State of California from adopting regulations which obligate an employer to compensate such employees at premium rates for all hours in excess of eight in one day or 40 in any one week.

In the case of *H.P. Welch Co. v. State of New Hampshire* (1939) 306 U.S. 79, 59 S.Ct. 438, this Court addressed an issue similar to that contained in the case at bar. In *Welch, supra,* the State of New Hampshire sought to enforce a statute which prohibited drivers of vehicles on its roads from operating in excess of 12 continuous hours. H.P. Welch Company appealed the order

of the State Public Service Commission suspending the firm's registration certificate for violation of the statute. The company contended that the New Hampshire statute was superseded by the passage of the Federal Motor Carrier Act of 1935 (49 U.S.C. 304). This Court found that the facts established that the violation had taken place after the Congress had passed the Act which enabled the Interstate Commerce Commission to regulate hours of employees, but before the Commission had adopted such regulations.

The Court noted that "it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed." (*H.P. Welch Co. v. State of New Hampshire, supra,* 306 U.S. 79 at 85.) The Court clearly stated its views regarding preemption of state statutes by the commerce clause of the Constitution in the *H. P. Welch Co.* case, *supra,* when it held:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do so is clearly manifested. . .
>
> "Plainly, Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public state highways." (*H.P. Welch Co. v. State of New Hampshire, supra,* 306 U.S. at 85).

The Court has not deviated from the views stated in *Welch, supra.* (See *Florida Lime and Avocado Growers v. Paul* (1963) 373 U.S. 132, 83 S.Ct. 1210).

The language of 49 U.S.C. 3102 contains no provision which could logically be construed to manifest an intent by Congress to preempt the inherent right of a state to adopt a minimum wage and to provide for the regulation of the hours of work of employees whose hours are not specifically regulated by the Secretary of Transportation.

The purpose of the enactment of the Motor Carrier Act, according to this Court, was to "secure the benefits of an efficient system. Safety through establishment of maximum hours for drivers was an important consideration." (*Southland Gasoline Co. v. Bayley* (1943) 319 U.S. 44 at 48, 63 S.Ct. 917).

There are varying techniques which may be utilized to enforce limitations on the maximum hours of work. The State of California has chosen the most common technique, the imposition of premium pay for enforcing limitations on the maximum hours of work. (*California Mfrs. Assn. v. Industrial Welfare Comm.* (1980) 109 Cal.App. 3d 95 at 111, 167 Cal.Rptr. 203). The Fair Labor Standards Act, 29 U.S.C. 207, employs the same basic technique.

In order to assure that there would be no overlapping of federal agency jurisdictions, Congress chose to expressly exempt from the overtime requirements of the Fair Labor Standards Act (see 29 U.S.C. 213(b)(1) and (2)) all employees whose maximum hours may be regulated by the Secretary of Transportation. However, there is no evidence that Congress intended to imply that the imposition of a rigid standard of maximum hours was inconsistent with imposition of an obligation to pay premium wages during those maximum hours. In an important comment on the subject of Congressional intent in this regard, this court, in the case of *Levinson v. Spector Motor Service* (1947) 330 U.S. 649, stated:

> "The logic of the situation is that Congress, as a primary consideration, has preserved intact the safety

> program which it and the Interstate Commerce Commission have been developing for motor carriers since 1936. To do this, Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service. Congress might have done otherwise. It might have permitted both Acts to apply. *There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in section 7 of the Fair Labor Standards Act.*" (*Levinson v. Spector Motor Service, supra,* at 661) (Emphasis added)

The California Industrial Welfare Commission has recognized that the regulations adopted by the provisions of Title 49, Sections 395.1 to 395.13 of the Code of Federal Regulations which limit the hours of *drivers* engaged in interstate commerce are sufficient protection for that class of employees and has exempted such *drivers* from the overtime provisions of the Industrial Welfare Commisison Orders. (See Title 8, Calif. Administrative Code section 11090, subsection 3(H).)

However, in view of the fact that neither the Interstate Commerce Commission nor the Secretary of Transportation have found it necessary to establish rules or regulations regulating the hours of labor of any other "safety of operation" employees, the Industrial Welfare Commission has not exempted these unprotected employess from the overtime regulations of the Orders.

While there undoubtedly exists a sound rationale for the adoption by the Congress of a scheme of regulating hours of service of safety of operations employees by simply limiting the number of hours they may work in a day; it is not a logical extension of that rationale to contend that, absent such regulation and a clearly mani-

fested intent by Congress to impose exclusive Federal control, there exists a preemption of a state's right to invoke its police powers to require premium pay for overtime.

The fact that Congress expressly declared its intention to limit the number of *Federal* agencies which would have enforcement powers in the transportation industry, does not imply that Congress intended to preempt state activity as to wages, hours and working conditions.

The two Federal Courts which have considered the relationship between state or municipal overtime provisions and the Federal statutory provisions contained in the Fair Labor Standards Act and the Department of Transportation Act (29 U.S.C. 213(b)(1); 49 U.S.C. 3102) determined that the Federal Statutes did not preempt the right of states to enforce provisions of local laws requiring premium rates for overtime.

Perhaps the most instructive case is that of *Williams v. W.M.A. Transit Company* (D.C. Cir.1972) 472 Fed.2d 1258, which involved a consideration of the District of Columbia Minimum Wage Act of 1966, an act passed by Congress which was patterned after the Fair Labor Standards Act. The District Minimum Wage Act contained most of the exemptions contained in Section 213 of the Fair Labor Standards Act with one notable exception: the D.C. Act omitted the exemption from the overtime requirements contained in 29 U.S.C. 213(b)(1) dealing with employees with respect to whom the I.C.C. (now the Secretary of Transportation) has the power to set maximum hours. The Court of Appeals, District of Columbia Circuit in *Williams v. W.M.A., supra,* concluded that the provision in 29 U.S.C. 213 providing an exemption from the overtime provisions for employees covered by I.C.C. or D.O.T. regulations was simply designed to obviate conflicting determinations by Federal agencies as to the requirements and that this is a different matter from the issue whether, or to what extent,

Congress intended to permit State law to apply to such employees.

As the Court in *Williams v. W.M.A. Transit Company, supra*, points out, Congress, in enacting the District of Columbia Minimum Wage Act of 1966, understood that it was exercising the same authority which would be available to any state[3]; yet it did not include the language found at 29 U.S.C. 213 exempting safety of operation employees from the overtime provisions of the legislation. In view of the fact that the Congress understood that it was approaching this legislation as it felt any state legislature could, the Court found that the fact the Congress failed to include the exemption was a powerful indicator that Congress did not intend to extend the exemption to employees covered by state overtime laws.

In the case of *District of Columbia v. Schwerman Trucking Co.* (1974) 327 Atl.2d 818, the District of Columbia's Minimum Wage Act was again before the courts. The District of Columbia Court of Appeals in the case of *Schwerman, supra*, which was published after the effective date of the Judicial Reorganization Act and at a time when the District of Columbia Court of Appeals had final authority to interpret a District of Columbia statute, determined that *Williams, supra*, did not constitute controlling precedent for that court and, as a result, the *Schwerman* Court reexamined the issue of "the asserted exclusion from the overtime provisions of the D.C. Minimum Wage Act of employees subject to hours of service regulations under the Federal Motor Carrier Act." In an exhaustive review of the law and the facts in that case, the court in *Schwerman* concluded that:

> "The answer to the question of whether the motor carrier exemption in the federal wage hour act of

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[3] See 112 Cong. Rec. 750 (1966): Discussion on floor of Senate regarding the District of Columbia Minimum Wage Act, wherein appears the following: "Sen. Javits: 'this proposal really amounts to a State minimum wage law'. Sen. Morse concurs."

> 1938 was also intended to apply to the D.C. Act of 1966 rests entirely upon an appraisal of Congressional intent at the time the latter statute was enacted. In reviewing the earlier local act in 1966, Congress lifted bodily from the Federal wage-hour statute numerous provisions *in haec verba.* Thus, where departures were made from wording in the corresponding sections of the parent act, conscious intent may be inferred.
>
> . . .
>
> "Accordingly, we must infer that the failure to exclude from the overtime coverage of the D.C. Act, the kind of motor carrier personnel defined in Section 13 of the Federal Act was deliberate. In this respect, we agree with the *Williams* opinion of the circuit." (*District of Columbia v. Schwerman Trucking, supra*, 327 Alt.2d at 823-824.)

As another court stated in the case of *Central Delivery Service v. Burch* (D.Md. 1973) 355 Fed.Supp. 954 (affirmed, 486 Fed.2d 1399):

> "If Congress had intended that the overtime regulations adopted under the Motor Carrier Act should be exclusive not only of any right to overtime under the Federal Fair Labor Standards Act, but also of any right to overtime under a private agreement or a State Wage and Hour Act, Congress could easily have so provided. It did not." (*Central Delivery, supra*, at 959)[4]

The reconsideration of the original case of *Williams v. W.M.A., supra*, by the court in *Schwerman Trucking, supra*, arose as a result of an amendment to the District of Columbia Minimum Wage Act of 1966 in response to a written opinion by the District's Corporation Counsel which stated that the Motor Carrier Act exemptions found in the F.L.S.A. did not apply to the D.C. Act. The House of Representatives reacted to the Corporation

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[4] The U.S. Court of Appeals, District of Columbia, adopted the conclusion reached in the *Schwerman* and *Central Delivery* cases, *supra*, in *Dove v. Coupe* (1985) 759 Fed.2d 167, at 171 (fn. 5) and at 173 (fn. 10).

Counsel's opinion by attempting to amend the D.C. Act to incorporate all of the exemptions found in 29 U.S.C. 13(b)(1) into the D.C. Act. In a conference Committee, the Senate forced the acceptance of a Senate amendment to the broad language adopted by the House and the D.C. Act was amended to provide that the overtime provisions did not apply to any employee with respect to whom the Interstate Commerce Commission has chosen to establish regulations provided such employee is not employed more than 50 per cent of any workweek within the defined Washington metropolitan region.[5]

Less than one year after the passage of this amendment, the House again attempted to amend the D.C. Act to provide the complete exemptions found in the F.L.S.A. The Senate struck out the provision and in the conference committee it was agreed to repeal the limited exemption adopted eleven months earlier. In presenting the conference report to the Senate, Senator Eagleton stated:

> "There are two other provisions in the conference agreement which should be called to the attention of the Senate.
>
> "The first provision relates to the overtime exemption for certain categories of employees relating to the trucking industry specifically section 707. Section 707 of the conference substitute amends the District of Columbia Minimum Wage Act to remove from that act an exemption from overtime pay for certain drivers, drivers' helpers, loaders, and mechanics. These employees will now be entitled to overtime compensation as they were prior to the adoption of the exemption." (117 Cong.Rec.Senate 46123, Dec. 10, 1971.)

There can be no clearer manifestation of the intent of Congress that the provisions of the Fair Labor Standards

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[5] The defined metropolitan region encompassed the District, Montgomery and Prince George's Counties in Maryland and the cities and counties of Alexandria and Fairfax in Virginia.

Act providing overtime exemptions for certain classes of employees were not intended to preempt or preclude the several states from adopting overtime laws which cover such employees than the actions of Congress dealing with the District of Columbia Minimum Wage Act. If it were the intent of Congress that the removal of the exemption from the D.C. Act had the effect, as Senator Eagleton stated, of restoring the previously exempt employees entitlement to overtime wages, there can be no doubt that Congress never intended that the exemptions found in Section 13(b)(1) of the F.L.S.A. were to have the effect of precluding the states from adopting and enforcing overtime provisions as to those employees.

It is equally clear that Congress did not intend the provisions of the Department of Transportation Act (49 U.S.C. 3102) to preclude the several states from adopting laws requiring employers of safety of operation employees to compensate such employees at premium pay for hours in excess of eight in any one day or forty in any one week.

If, as appellant contends, the Fair Labor Standards Act superseded and displaced all state and local regulation inconsistent with the provisions of the Act, the states and the District of Columbia would have been precluded from adopting any overtime provision dealing with all those retail and service establishment employees exempted under Section 13 of the F.L.S.A. including employees of amusement or recreational establishments, organized camps, or religious or non-profit educational centers; many agricultural employees; boat and trailer salesmen; and, under certain circumstances, newspaper and radio station employees.

If the breadth of the Fair Labor Standards Act were as broad as appellant contends, there would be little room left for state regulation in the wage and hour field and the provisions of Section 218 of the F.L.S.A. would become meaningless. The mere recitation of the logical

consequences of the appellant's contention, of course, signals the extreme tenuousness of appellant's argument.

CONCLUSION

It appears certain that Congress never intended to preempt the field of wage and hour regulation by the states through the adoption of the Fair Labor Standards Act. The contention that the effect of the Congress' grant of authority to the Secretary of Transportation to regulate the hours of service of safety of operations employees of interstate transportation firms precludes state legislation obligating employers to compensate such employees at premium rates for overtime is equally without merit.

Appellee, Division of Labor Standards Enforcement, respectfully requests that this Honorable Court either dismiss the appeal herein for lack of a substantial Federal question or affirm the judgment below.

Dated: August 22, 1986

Respectfully submitted,

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REPLY IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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REPLY IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Appellant, Lodi Truck Service, Inc., pursuant to Rule 16 of the Rules of the Supreme Court of the United States hereby replies to appellee's motions to dismiss or affirm the decision of the California Superior Court.

INTENT OF CONGRESS TO GRANT EXCLUSIVE JURISDICTION TO A SINGLE FEDERAL AGENCY OVER HOURS OF SERVICE OF INTERSTATE MOTOR CARRIER SAFETY EMPLOYEES

Appellee in both motions to dismiss or affirm[1] offers the argument that Congress has not evidenced a manifest intent to preempt the field, i.e. grant to the United States Department of Transportation ("D.O.T.") exclusive jurisdiction over the work hours of safety of operations employees of interstate motor carriers regulated by the Interstate Commerce Commission ("I.C.C."). The motions contain no discussion of the pertinent or governing statutes, the Interstate Commerce Act and the Fair Labor Standards Act ("FLSA"), or the intent of Congress and the language by which the federal legislature expressed its wishes, policy and purpose of the legislation. The reason for this omission is apparent—the legislative intent and history is manifestly contrary to the position of the appellee. Absence of challenges by the respective states or local governments to the federal agency's exclusive powers over the hours of these employees over the past 50 years should make the current assumption over such hours by a state very suspect. The Motor Carrier Act of 1935 ("MCA"), pursuant to which the I.C.C. was granted jurisdiction over the hours of service of safety of operation employees of interstate motor carriers and the FLSA enacted in 1938, which affirmed Congress' intent to grant to the I.C.C., and now the D.O.T. exclusive jurisdiction over these hours, have remained substantially unchanged since they became law. Legislative histories of these acts reflect a clear and manifest Congressional intent that other federal, state, municipal and other local governmental agencies shall not have concurrent control with the D.O.T. over the service hours of these employees.

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[1] Motions to dismiss or affirm were filed on behalf of the Division of Labor Standards Enforcement, the Department of Industrial Relations, the State of California, by the Attorney General of the State of California and by the Department of Labor Standards enforcement.

In a directly related and leading case, the United States Supreme Court was required to determine the intent of Congress with respect to the relationship of the power of the I.C.C. over the hours of service of safety of operation employees of interstate motor carriers and the exception or preclusion of control of the same hours by other governmental agencies. In *United States v. Amercian Trucking Association,* 310 U.S. 534, 60 S.Ct. 1059 (1940), it was declared that the function of the court in interpreting statutes is to "construe the language so as to give effect to the intent of Congress." "There is, of course," it stated, "no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes. . . . When that plain meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole', this court has followed that purpose rather than the literal words. . . . Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts." The Supreme Court further stated that the general practice or policy of Congress has been consistent in legislating for qualifications and hours of transportation employees and referred to the statutes enacted pursuant to this policy: "The Hours of Service Act proposes restrictions on the hours of labor of employees 'actually engaged in or connected with the movement of any train.' The Seamen's Act limits employee regulations under it to members of ships' crews. The Civil Aeronautics Authority has authority over the hours of service of employees 'in the interest of safety' ". (Id. at 1063, 1064)

The 1907 railroad employees' Hours of Service Act (34 Stat. 1415), the Seamen's Act (38 Stat. 1164, 1169, 1170-1184), enacted in 1915, the Civil Aeronautics Act of 1938 (52 Stat. 1007), and the Motor Carrier Act of 1935 (49 Stat. 543) are pieces of the general scheme of Congress to permit only individual federal agencies to establish the limits of the hours of work for these transportation employees. The federal legislature, in recognition of this long established policy, included Subsections 13(b)(1)(2)(3) and (6) (29 U.S.C. 213(b)(1)(2)(3) and (6))

in the FLSA to assure protection for the exclusivity of these powers granted to the agencies. The appellee, however, argues that the exclusive power was not the intent of Congress in enacting these laws and that no restraint or inhibition is placed upon the state's power to control the work hours of such transportation workers. The effect of this position, if sustained, would be for any federal, state, municipal, or other government or their agencies to assume joint or concurrent control over the hours of these employees except; however, the U.S. Department of Labor, which is precluded from doing so by virtue of Subsection 13(b)(1)(2)(3) and (6) of the FLSA. Appellee's argument is manifestly without merit and would produce an absurd result. The absurdity of this interpretation is made readily apparent by the fact that if appellee's motion is granted, there will be literally hundreds and perhaps thousands of governments and their agencies in the 50 states that will be vested with the power to regulate the hours of the safety employees of interstate motor carriers. When the Motor Carrier Act was passed in 1935, 40 states had regulatory measures relating to the hours of service of motor carrier employees. *United States v. American Trucking Association,* 60 S.Ct. at 1065. With this knowledge, Congress wisely reserved the power to establish hours for the safety employees of interstate motor carriers in the single governmental agency and avoided what would otherwise be a chaotic and unreasonable situation.

The two statutes, MCA and FLSA, are unquestionably among the most pervasive and comprehensive regulatory schemes ever enacted by the federal legislature. *United States v. Darby,* 312 U.S. 100, 61 S.Ct. 451 (1940); *Kirschbaum v. Walling,* 316 U.S. 517, 62 S.Ct. 1116 (1942); *Castle v. Hayes Freight Lines, Inc.,* 348 U.S. 61, 75 S.Ct. 191 (1954); *Mitchell v. H.B. Zachry,* 362 U.S. 310, 80 S.Ct. 739 (1960); *Chicago & North Western Transp. v. Kalo Brick & Tile Co.,* 450 U.S. 333, 101 S.Ct. 1124 (1981). Both laws have long expository histories as Congress had before it annually between 1926 and 1935 legislation to regulate interstate motor carriers and the multiple attempts that were made to establish federal wage and hour laws graphically reveal the intent and purpose of the FLSA. 79 Cong.Rec. 5650, 12204; *Schecter v. United States,* 295 U.S. 495, 55 S.Ct. 837 (1935).

When considering Senate Bill 1629, enacted as the Motor Carrier Act of 1935, there were long debates in both the House and Senate concerning granting control to the I.C.C. over the qualifications and maximum hours of service of motor carrier employees. 79 Cong.Rec. 5651, 5652, 12204-12206, 12209, 12225, (1935). It was suggested to the committees of both houses to write maximum or specific hours for the motor carrier safety employees which was rejected in favor of granting the I.C.C. discretionary authority with flexibility to "take into consideration all peculiarities and emergencies that exist in the motor carrier industry." 79 Cong.Rec. 5652, 12205, 12225 (1935). The appellee, however, seeks to impose maximum or specific work hour limitations for these employees directly contrary to the wishes and decision of Congress. Senator Wheeler, sponsor of Senate Bill 1629, stated concerning the proposal to limit the work hours "We left it as the Commission suggested, giving them power to make the investigation and, if and when they found it necessary, to put into effect such rules and regulations as they might deem necessary." 79 Cong.Rec. 5652 (1935).

Section 204(a)(1) of the Interstate Commerce Act (49 U.S.C. § 304(a)(1)) enacted in 1935 declared it to be the duty of the Commission to regulate interstate motor carriers and to establish reasonable requirements with respect to "qualifications and maximum hours of service of employees and safety of operation and equipment". Through enactment of the D.O.T. Act and recodification, the D.O.T. is now authorized to prescribe: "(1) Qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier."(29 U.S.C. § 3102(b))

In 1938, the FLSA became law through which Congress adopted a comprehensive scheme for regulating the wages and hours of all employees that were directly or indirectly involved in interstate commerce. The effect of this legislation was to preempt all state and local governmental controls over wages and hours of all employees with limited exceptions. Justice Owen Roberts, in discussing the effects of the landmark case, *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451 (1940), which upheld the constitutionality of the FLSA, stated:

> "Of course, the effect of sustaining the Act was to place the whole matter of wages and hours of persons employed

throughout the United States, with slight exceptions, under a single federal regulatory scheme and in this way, completely to supersede state exercise of the power in this field." Roberts, the Court and the Constitution, 56, 58 (1951)

In *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 320, 80 S.Ct. 739, 745 (1960) Mr. Justice Frankfurter stated that the [FLSA] has "displaced state regulation throughout the fartherest reaches of the channels of interstate commerce". The extent of this reach was demonstrated in an early and leading case involving the scope of the law, *Kirschbaum v. Walling*, 316 U.S. 517, 62 S.Ct. 1116 (1942), in which the court concluded that maintenance, operating and janitorial employees of a six-story loft building, whose tenants manufactured ladies' garments that were shipped in interstate commerce, were covered by the FLSA.

During the FLSA Congressional debates, there were many members of both the Senate and House that strongly urged that the wage and hour problem be met through a method of state control implemented and aided by the federal government. However, this was rejected by Congress, thereby preempting the jurisdiction of states over this subject matter. 81 Cong.Rec. 2445-2448, 2720-2725 (1937). Appellee seeks to change this decision of Congress.

In drafting the FLSA legislation, significant consideration was given to adopting a policy that would be consistent with other regulatory laws. Senator Black, chairman of the committee responsible for drafting Senate Bill 2475, *repeatedly* stated that the Committee believed that "it would certainly be unwise to have hours of service regulated by two governmental agencies." 81 Cong.Rec. 7875 (1937) Pursuant to this consistent Congressional policy, amendments were proposed and adopted specifically exempting motor carrier, railroad, maritime, and aviation employees from Section 207 (overtime hours) of the FLSA. (29 U.S.C. 213(b)(1)(2)(3)(6)) It is to be noted that Section 13(b)(1) (29 U.S.C. 213(b)(1)) of the FLSA exempts any safety of operation employee with respect to whom the Secretary of Transportation has the "power" to establish qualifications and maximum hours of service. It does not and Congress purposely did not intend that this authority read, as urged by the appellee, with "respect to whom the Secretary of Transportation *has* established maximum hours of service."

In *United States v. American Trucking Association*, supra, the United States Supreme Court considered the relationship of the Section 18 (29 U.S.C. 218) "savings" clause of the FLSA and the Section 13(b)(1) exemption of the work hours of motor carrier employees. Section 18(a), in part, states:

> "(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter *or a maximum workweek lower than the maximum workweek established under this chapter*. . . ." (Emphasis added)

It is evident that the language of this provision of the FLSA allows federal, state and local governments and agencies to regulate hours of work which they would otherwise be preempted from doing. However, this permissive authority only applies to employees whose hours or work weeks are established by the FLSA, not those excepted therefrom. Maximum work weeks are not established for motor carrier safety employees under the FLSA. The language adopted by Congress in Section 18(a) manifestly precludes any second governmental agency from assuming jurisdiction over the hours of such employees. See also *Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48, 49, 63 S.Ct. 917 (1943), *Weaver v. Pittsburgh S.S. Co.*, 153 F.2d 597, 599 (1946). In determining the intent of Congress with respect to the relationship between Section 18(a) and Subsection 13(b)(1) of the FLSA (29 U.S.C. 18(a), 13(b)(1)), the United States Supreme Court in *United States v. American Trucking Association*, supra, 60 S.Ct. at 1062, stated:

> "Section 7 of this Act (FLSA) limits the workweek at the normal rate of pay of all employees subject to its terms and Section 18 makes the maximum hours of the Fair Labor Standards Act *subject to further reduction by applicable federal or state law or municipal ordinances. There were certain employees excepted, however, from these regulations by Section 13(b). It reads as follows:*
>
> *'Sec. 13 [213]. ***(b) The provisions of section 7 [207] shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pur-*

*suant to the provisions of Section 204 [304 of Title 49] of the Motor Carrier Act, 1935,***.* * (Emphasis Added)

Appellee argues that Congress intended to permit an overlapping of the enforcement of maximum hours of service for safety purposes and, at the same time, require compliance with increased rates of pay for work performed in excess of those hours. However, the United States Supreme Court held that: "Such overlapping, however, has not been authorized by Congress and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act." *Levinson v. Spector Motor Service,* 330 U.S. 649, 67 S.Ct. 931 (1947).

THE CLEAR INTENT OF CONGRESS WAS TO ENACT A REGULATORY SCHEME THAT COMPLETELY OCCUPIED THE FIELD AND DISPLACED STATES' POWER OVER SAFETY OF OPERATION EMPLOYEES OF INTERSTATE MOTOR CARRIERS

Appellee argues that Congress granted authority to the I.C.C. and now D.O.T. to regulate hours of service of all safety of operation employees of interstate motor carriers but as that agency has not exercised the authority with respect to mechanics, the state may fill that vacuum, assume such jurisdiction and fix maximum hours for these workers. Under Code of Federal Regulations, Title 49, Section 350-399, the D.O.T. has promulgated comprehensive Federal Motor Carrier Safety Regulations which include qualifications, operating procedures and hours of service of drivers, duties and responsibilities of mechanics, and rules for loading and protection of cargoes while in transit. Congress expressly gave the Commission "power to make the investigation and, if and when they found it necessary, to put into effect such rules and regulations as they might deem necessary." 79 Cong.Rec. 5652 (1935) The posture assumed by appellee is that anything not regulated is fair game for control by the state.

The exclusive power of the I.C.C., even though unexercised, over the qualifications and hours of these employees was reaffirmed by Congress by the enactment of the FLSA as described above. In *Southland Gasoline v. Bagley,* 319 U.S. 44, 63 S.Ct.

917 (1943), the United States Supreme Court referring to *United States v. ATA,* 310 U.S. 534, 84 L.Ed. 1345, 1350, 60 S.Ct. 1039, rejected the argument that the I.C.C. did not have the "power to" regulate the hours of the safety employees and concluded that it was unnecessary for the Commission to make a finding of a need for maximum hours for the power to exist.

The court has declared that the power, not the actual exercise of that power, is determinative of the existence of such an exception. *Levinson v. Spector Motor Service,* supra, *Morris v. McComb,* 332 U.S. 422, 68 S.Ct. 125 (1948), *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 628, 93 S.Ct. 1954 (1973), *Napier v. Atlantic Coast Line R. Co.,* 272 U.S. 605, 47 S.Ct. 207 (1926).

Appellee, in both motions, relies almost totally upon the decision of this court in *H.P. Welch Co. v. New Hampshire,* 306 U.S. 79, 59 S.Ct. 438 (1939), to support its argument that the state may assume jurisdiction over the work hours of appellant's mechanics absent such regulation by the federal agency. That proceeding did not involve overtime compensation and the subject violation preceded the enactment of the FLSA on June 25, 1938 which exempted the work hours of safety of operation employees from the control of any federal, state or municipal governmental agency other than the I.C.C. as discussed above. *United States v. American Trucking Association,* supra.

CASES CITED BY APPELLEE ARE NOT DIRECTLY RELATED OR APPLICABLE TO THE ISSUE HEREIN

The motion to dismiss or affirm filed by counsel for the appellee, Division of Labor Standards, attempts to assign significant consideration and pertinence to two District of Columbia cases, *Williams v. W.M.A. Transit Company* (D.C. Cir. 1972) 472 F.2d 1258, and *District of Columbia v. Schwerman Trucking Co.* (D.C. Cir. 1974) 327 Atl.2d 818. Neither the case law nor the legislative history supports this position. Because of the Judicial Reorganization Act (84 Stat. 473; D.C. Code 1973 Section 11-102), the *Schwerman* court declared that it had final authority to interpret a District of Columbia enactment" and that "the opinion (of the *Williams* court) does not constitute controlling precedent for this court," The opinion of the *Schwerman* court includes a comprehensive review of the history of the

District of Columbia Minimum Wage Act enacted in 1966 and amendments to the Act passed in 1970 and 1972 and its relationship to Section 204 of the MCA (49 U.S.C. 304) and Section 13(b)(1) of the FLSA (29 U.S.C. 213(b)(1)) to determine the intent of Congress relative to overtime coverage of safety employees of motor carriers employed in the District. The court concluded that Congress *deliberately* failed to exclude motor carrier personnel from overtime coverage of the D.C. Act. Id at 822. This conclusion was based upon Congress' "bodily lifting" the D.C. Act from numerous provisions of the FLSA and excepting therefrom railroad, seamen and various categories of employees included in Section 13 of the Federal Act but not excepting motor carrier personnel. Amendments to the D.C. Act in 1970 again exempted such motor carrier employees but the exemption was once again eliminated by Congress in 1973. This history described in *Schwerman* decision clearly shows that Congress was only considering and enacting legislation pertinent to the District of Columbia and was manifestly not related to the 50 states. The only reference to a state by the court is the observation that "Congress was acting only as a state legislature would in passing a minimum wage law." Id. at 825. The argument and statements in the motion filed by the Division of Labor Standards Enforcement are not supported by and in part inconsistent with the findings and language of the court in the *Schwerman* case.

Central Delivery Service v. Burch (D.C. Md) 355 F.Supp. 954, affirmed, 486 F.2d 1399 (1973) is an aberration that is contrary to the intent of Congress, contemporaneous decisions of the courts and recognition of the plenary power by the individual states of the federal government's jurisdiction of the work hours of motor carrier safety personnel. *Dove v. Coupe* (D.C. Cir.) 759 F.2d 167 (1985), is a suit for minimum and overtime wages based upon the District of Columbia Minimum Wage Act.

The attorney general's motion cites *Ray v. Atlantic Richfield*, 435 U.S. 151, 171-172 (1978), *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960); *Service Transfer Co. v. Virginia*, 359 U.S. 171, 179 (1959); *Bethlehem Co. v. State Board*, 330 U.S. 767, 773 (1946); *Arkansas Elec. Coop. v. Ark. Public Ser. Comm'n*, 461 U.S. 375, 387-389 (1938), in support of the argument that if a federal agency is authorized to regulate and does not, a state may do so. However, these cases also hold that states may only

exercise their jurisdiction when there is an absence of a Congressional intent to establish a comprehensive, regulatory scheme which occupies the field. They further hold that when the federal agency's failure to exercise its full authority takes on the character of a ruling, state action is impermissible.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted and the judgment of the Superior Court of the State of California should be reversed.

Respectfully submitted,

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Inc.

Dated: September 12, 1986